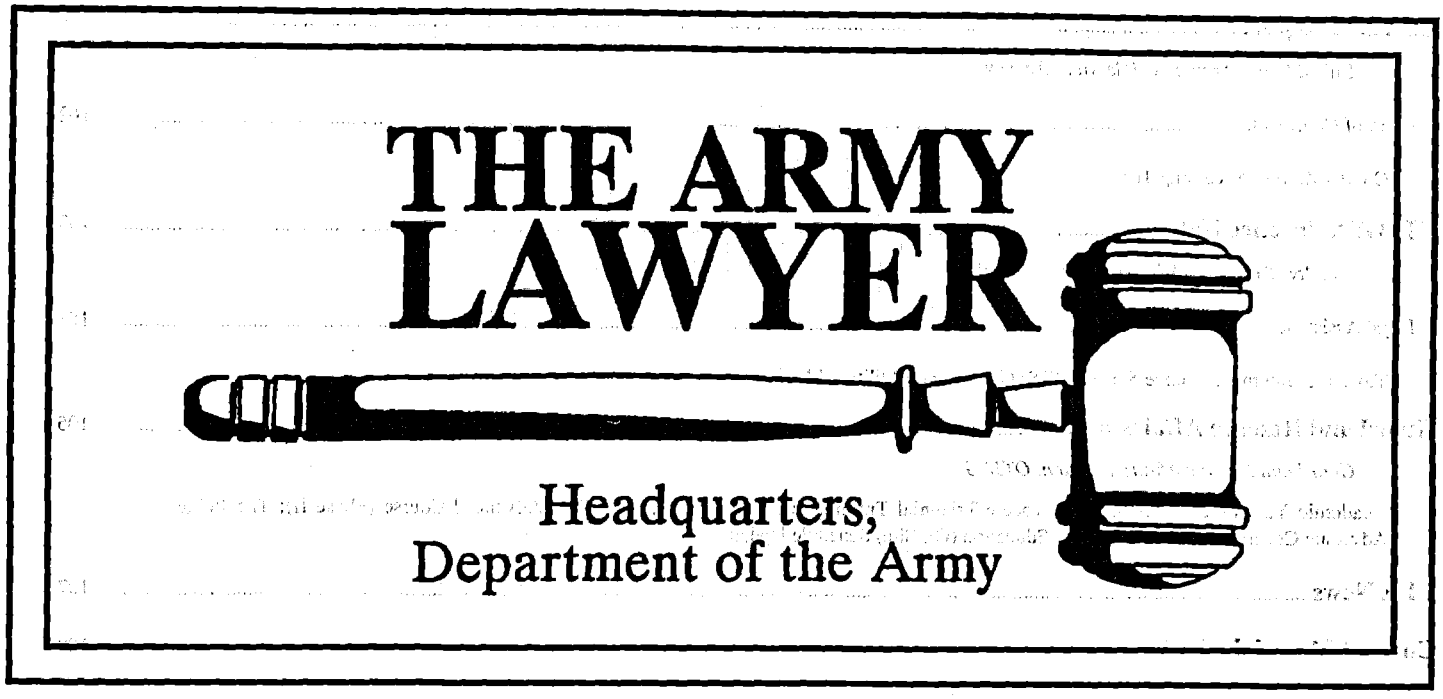

Department of the Army Pamphlet 27-50-267

February 1995

Table of Contents

Articles

The Army Lawyer (ISSN 0364-1287)

Editor
Captain John B. Jones, Jr.

The Army Lawyer is published monthly by The Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. The opinions expressed by the authors in the articles, however, do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed double-spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles also should be submitted on floppy disks, and should be in either Enable, WordPerfect, Multimate, DCA RFT, or ASCII format. Articles should follow *A Uniform System of Citation* (15th ed. 1991) and *Military Citation* (TJAGSA, July 1992). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals, the Current Law Index, the Legal Resources Index*, and the *Index to U.S. Government Periodicals*.

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, telephone (202) 783-3238.

Address changes: Provide changes to the Editor, *The Army Lawyer*, TJAGSA, Charlottesville, VA 22903-1781.

Issues may be cited as ARMY LAW., [date], at [page number].

Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903-1781.

1994 CONTRACT LAW DEVELOPMENTS —THE YEAR IN REVIEW

Major Nathanael Causey; Major Steven N. Tomanelli;
Lieutenant Colonel John A. Krump;
Major Douglas P. DeMoss; Major Karl M. Ellcessor, III;
Major Timothy J. Pendolino; Major Andy K. Hughes;
Major Samuel R. Maizel (USAR)

I. Foreword

What a difference a year makes in the life of a Government Contract Attorney! Last year saw few tangible results from the plethora of attempts at acquisition reform. But, like Arnold the Terminator or a phoenix arising from its ashes, reform kept coming back. The Bottom Up and National Performance Reviews, along with the Section 800 Panel Report, provided an excellent foundation for serious acquisition reform, and Herculean congressional efforts finally culminated in the passage of the Federal Acquisition Streamlining Act of 1994. Though not a golden elixir for all that troubles the system, it clearly is a significant step in the reform process.

We begin by providing a summary of the Streamlining Act's provisions most likely to affect practitioners of government contract law. Although implementing regulations have yet to be published, we have highlighted key regulatory provisions affected by the Act. This article also provides an analysis of other 1994 procurement-related statutes, cases, administrative decisions, and regulations. We hope you will find the article of assistance in your day-to-day operations. Best wishes for a happy and prosperous new year from the Contract Law Division, The Judge Advocate General's School, United States Army.

II. Federal Acquisition Streamlining Act

A. Contract Formation

1. Alternative Sources (FASA § 1002).—The Federal Acquisition Streamlining Act of 1994 (FASA)[1] adds three additional bases for limiting competition to establish or maintain additional sources of supply:[2] (1) to ensure the continuous availability of a reliable source of supply; (2) to satisfy projected needs based on a history of high demand; and (3) to satisfy a critical need for medical, safety, or emergency supplies. Agencies may not use class Determinations and Findings (D&Fs) to exercise this authority.[3]

2. Higher Level Approving Authorities May Approve Justification and Approvals (J&As) (FASA § 1003).—A J&A at a dollar level requiring competition advocate approval may be approved by a higher level approval authority (*e.g.*, the Head of the Contracting Activity (HCA)).[4]

3. Expert Services (FASA § 1005).—Agencies may now use noncompetitive procedures to procure the services of an expert for use in any litigation or dispute.[5] This authority extends to any "reasonably foreseeable litigation or dispute" and to the use of experts in alternative dispute resolution (ADR) proceedings.[6]

4. Changes in the Rules Governing Negotiated Procurements (FASA §§ 1011, 1061).—Although the FASA does not completely rewrite the rules that federal agencies must follow when conducting negotiated procurements, it does make some changes, and it unifies most of the rules that apply to Department of Defense (DOD) and civilian agencies. Additionally, both DOD and civilian agencies will now be allowed to award on the basis of initial proposals to an offeror who is not necessarily the lowest in price.[7] The FASA also changes the way disclosure of the relative weights of evaluation criteria is made in new solicitations, requiring explicit notice whether the combined noncost or nonprice evaluation factors are significantly more important than cost or price, approximately equal in importance with cost or price, or significantly less

---

[1] Pub. L. No. 103-355, 108 Stat. 3243 (1994) [hereinafter FASA].

[2] *Id.* § 1002 (amending 10 U.S.C. § 2304(b)(1)).

[3] *Id.* § 1002 (amending 10 U.S.C. § 2304(b)).

[4] *Id.* § 1003 (amending 10 U.S.C. § 2304(f)(1)(B)(i)). Competition advocate approval is required for proposed contracts between $100,000 and $1 million. *See* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 6.304(a)(2) (Apr. 1, 1984) [hereinafter FAR].

[5] *Id.* § 1005 (amending 10 U.S.C. § 2304(c)(3)). This authority applies whether or not the expert is expected to testify.

[6] *Id.*

[7] *Id.* § 1061(c) (amending 10 U.S.C. § 2305(a) and 41 U.S.C. § 253a(d) to provide civilian agencies the same ability as the DOD to make award on initial proposals that offer the best value to the government, even if they are not the lowest in overall cost).

important than cost or price.[8] Finally, the FASA provides statutory recognition for past performance as an evaluation factor;[9] however, the increased use of this factor already is a reality because of recent executive branch efforts to require consideration of past performance in source selections.[10]

5. Prompt Notice of Award (FASA §§ 1013, 1014).—Once an agency makes award, it must notify, in writing or by electronic means, the losing offerors of this decision.[11] Award notification is the first of a series of time-sensitive events that could significantly affect protest litigation. In negotiated procurements, if a losing offeror requests a debriefing within three days of receipt of the award decision, the agency *must* debrief the vendor within five days of the request.[12] Once the debriefing is given, the "protest clock" starts ticking. Under the new rules, the unsuccessful offeror is entitled to a more informative debriefing than generally was provided in the past.[13]

6. Protest File (FASA § 1015).—In the event of a protest to the General Accounting Office (GAO), the agency may be required to establish a protest file for access by actual or prospective offerors.[14] The agency must establish a protest file on the request by an actual or prospective offeror. The FASA directs that implementing regulations be patterned after the guidance contained in Rule 4 of the General Services Administration Board of Contract Appeals (GSBCA) Rules of Procedure (which describes the contents of the so-called "Rule 4 file").[15]

7. Agency Actions on Protests (FASA §§ 1016, 1066).—The FASA expands an agency's authority to act on protests by allowing the agency head to pay a protester its costs for pursuing a meritorious protest.[16] Interestingly, this provision appears to apply to all protests, including agency-level protests.[17] By taking advantage of this new authority, agencies may persuade potential protesters to dispose of their disputes as an agency protest, rather than through formal litigation.

8. Types of Contracts (FASA § 1021).—Contracting officers no longer are required to execute a D&F prior to using a cost contract, cost-plus-fixed-fee contract, or incentive-fee contract.[18] Formerly, agency heads (or delegees) were required to determine that such contract types are "likely to be less costly to the United States than any other kind of contract or that it is impracticable to obtain property or services of the kind or quality required," except under such contracts.[19]

9. The FASA Creates New Severable Service Funding Exception (FASA § 1073).—Agencies subject to the Federal Property and Administrative Services Act of 1949[20] may now

---

[8] *Id.* §§ 1011(b), 1061(c).

[9] *Id.* §§ 1011(b), 1061(b), 1091.

[10] *See infra* note 358 and accompanying text.

[11] FASA, *supra* note 1, § 1013 (amending 10 U.S.C. § 2305(b)(3)).

[12] *Id.* § 1014 (amending 10 U.S.C. § 2305(b)).

[13] *Id.* The new debriefing provisions require agencies to conduct debriefings to the extent practicable within five days of an offeror's request for a debriefing. The FASA also states that the debriefing shall include, as a minimum: (1) the agency's evaluation of an offeror's weak or deficient evaluation factors; (2) the overall evaluated cost and technical rating of both the awardee and the debriefed offeror; (3) the overall ranking of all offers and the rationale for the award decision; and (4) reasonable responses to relevant questions posed by debriefed offerors.

[14] *Id.* § 1015 (amending 10 U.S.C. § 2305).

[15] *Id.*

[16] *Id.* §§ 1016, 1066. *See also* 31 U.S.C. § 3554(c)(1) (describing these costs as costs attributable to pursuing a protest, including "reasonable" attorneys' fees and bid and preparation costs).

[17] *See* FAR 33.103.

[18] FASA, *supra* note 1, § 1021.

[19] 10 U.S.C. § 2306(c) prohibited cost contracts, cost-plus-fixed-fee contracts, or incentive-fee contracts without making such a determination. This subsection has been repealed by FASA § 1021. Because FASA § 1021 is effective without regulatory implementation, *FAR* 16.301-3 and *Defense Federal Acquisition Regulation Supplement (DFARS)*, pertaining to the D&F requirement, no longer are statutorily required. *See* DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 216.301-3(c) (Apr. 1, 1984) [hereinafter DFARS].

[20] 41 U.S.C. § 252. All executive agencies except the DOD, the Coast Guard, the National Aeronautics and Space Administration (NASA), and several other exempted agencies (*e.g.*, the Postal Service) are subject to the Federal Property and Administrative Services Act.

fully fund contracts for severable services[21] for any twelve-month period with funds available at award.[22] The new provision is broader than a similar DOD provision,[23] in that it covers all severable service contracts.[24]

10. Report on Competition (FASA § 1092).—The FASA repeals the statutory requirement for agencies to submit annual reports on competition.[25]

11. Truth in Negotiations Act (TINA) Dollar Threshold Stabilized (FASA § 1201).—Congress "stabilized" (at $500,000) the threshold for submission of TINA[26] cost or pricing data.[27] Additionally, the FASA indexes the TINA threshold so that, beginning in 1995, it will be adjusted for inflation (rounded to the nearest multiple of $50,000).[28]

12. Authority to Require Cost or Pricing Data Limited (FASA § 1202).—The FASA strengthens the current lead-in language to the TINA by clearly prohibiting the agency from requesting cost or pricing data when any TINA exemption is present.[29] Hence, the agency "shall not" require contractors to provide cost or pricing data when prices are based on: (1) adequate price competition; (2) established catalog or market prices of commercial items sold in substantial quantities to the general public; or (3) prices set by law or regulation. Additionally, these exemptions apply to contracts, subcontracts, and modifications to a contract or subcontract.[30]

This provision also directs that any implementing *Federal Acquisition Regulation (FAR)* provision shall provide that the exemption for "items sold in substantial quantities" applies regardless of the quantity sold to the government.[31]

13. Special Rules for Commercial Items (FASA § 1204).—The FASA directs agencies, to the maximum extent practicable, to purchase commercial items competitively.[32] When the commercial item is purchased under competitive conditions, the agency is prohibited from requesting cost or pricing data. Additionally, when the commercial items are subject to the competitive process, the agency cannot require cost or pricing data unless the contracting officer states in writing that this information is necessary to determine price reasonableness. Any sales data that the contracting officer requests must be in the form regularly maintained by the vendor in commercial operations.[33]

14. Protests Defined (FASA §§ 1401, 1438).—The definition of a protest is expanded to reflect current GAO practices and to mirror the GSBCA definition.[34] As defined, protests include an objection by an interested party to: an agency request for offers to form a contract; the cancellation of such a request; and the cancellation of a contract award due to the agency's perception of improprieties in the procurement process (*i.e.*, a "reverse protest").[35]

---

[21] The GAO has defined "severable services" as services that can be separated into components that independently meet a separate need of the government. *See* Incremental Funding of United States Fish and Wildlife Serv. Research Work Orders, B-240264, 1994 U.S. Comp. Gen. LEXIS 198 (Feb. 7, 1994); *see also* Contract Law Div. Note, *Funding of Service Contracts: The GAO Clarifies the Rules*, ARMY LAW., Sept. 1994, at 34.

[22] FASA, *supra* note 1, § 1073.

[23] 10 U.S.C. § 2410a. Under this statute, the DOD may cross fiscal years with severable service contracts for: (1) maintenance of tools, equipment, and facilities; (2) leases of real and personal property (including maintenance); (3) depot maintenance; and (4) operation of equipment.

[24] The new provision does not apply to the Coast Guard or NASA, which means that those agencies still have no statutory authority to fully fund severable service contracts, crossing fiscal years, with annual funds available at award.

[25] FASA, *supra* note 1, § 1092 (repealing 41 U.S.C. § 419).

[26] 10 U.S.C. § 2306a (DOD agencies); 41 U.S.C. § 254(d) (civilian agencies). This section will address only those changes that affect 10 U.S.C.

[27] FASA, *supra* note 1, § 1201 (amending 10 U.S.C. § 2306a(a)). Although the threshold currently is $500,000, it is required to drop back to $100,000 on January 1, 1996. *See* 10 U.S.C. § 2306a.

[28] FASA, *supra* note 1, § 1201 (amending 10 U.S.C. § 2306a(a)).

[29] *Id.* § 1202 (amending 10 U.S.C. § 2306a(b)).

[30] *Id.*

[31] *Id.*

[32] *Id.* § 1204 (amending 10 U.S.C. § 2306a).

[33] The provision also limits the time period during which the government may audit this information to no more than two years following contract award. The scope of the audit is apparently limited to determining the "accuracy" of the information, not its completeness or currency. *Id.*

[34] *Id.* §§ 1401, 1438.

[35] *Id.*

15. Working Days Converted to Calendar Days (FASA §§ 1402, 1433).—Parties to a protest no longer will have to distinguish between working days and calendar days when determining the protest timetable. All time-sensitive requirements are now measured in calendar days.[36] When the end of the specified time period falls on a holiday, during the weekend, or an emergency closing, the deadline extends to the next working day. Some of the important GAO/GSBCA protest deadlines include the following:

	Old Rule (Working Days)	New Rule (Calendar Days)
GAO:		
–Protest Filing Deadline	10	14
–Filing Deadline to Obtain Competition in Contracting Act (CICA) Stay[37]	10 (calendar days)	10[38]
–Submission of Agency Report (GAO)	25	35
–GAO Decision	90	125
–Express Option Decision	45	65
GSBCA:		
–Protest Filing Deadline	10 (working days)	10
–Filing Deadline to Obtain Suspension	10 (calendar days)	10[39]
–Suspension Hearing	10 (calendar days)	10[40]
–GSBCA Decision	45	65

16. Protest Costs and Fees (FASA §§ 1403, 1435).—Perhaps one of the most discussed provisions of the FASA at a "K Street" cocktail party concerns the payment of expert witness fees and attorney fees in protest litigation. The FASA limits expert witness fees to the levels established by the Equal Access to Justice Act (EAJA).[41] More significantly, the FASA caps attorneys' fees at $150 per hour.[42] These limits, however, do not apply when the protester is a small business.

17. Postaward Stays/Suspensions of Performance (FASA §§ 1014, 1402, 1433).—The FASA authorizes an extension of the time for requesting a CICA stay or a GSBCA suspension beyond the tenth calendar day after award. In short, an agency *must* suspend contract performance if a protest is filed by the tenth calendar day following contract award *or* the fifth calendar day following a *timely-requested* debriefing, whichever is later.[43]

Additionally, the FASA expressly authorizes the contracting officer to suspend contract performance if she determines in writing that a GAO protest is likely to be filed and immediate performance is not in the best interests of the United States.[44]

18. Relief for Agencies: GSBCA Suspensions and Preaward Protests (FASA § 1433).—One of the more notable differences between the GAO and board protests has been the degree of preaward activity an agency could undertake pending the resolution of a protest. Under the Brooks Act,[45] before an agency could continue a procurement, it had to demonstrate "urgent and compelling circumstances" to lift the suspension *and* show that award was likely within thirty days of

---

[36] *Id.* §§ 1402 (amending 31 U.S.C. § 3553), 1433 (amending 40 U.S.C. § 759(f)).

[37] 31 U.S.C. § 3553(c).

[38] This deadline may hinge on whether and when a mandatory agency debriefing occurs. *See supra* note 12 and accompanying text.

[39] *Id.*

[40] The five calendar days commence on the filing of a protest or the date of the debriefing, whichever is later. *See* FASA, *supra* note 1, § 1433(a)(2).

[41] The FASA limits expert witness fees to no more than the "highest rate of compensation for expert witnesses paid by the Federal Government." *Id.* §§ 1403(b)(2) (amending 31 U.S.C. § 3554(a)), 1435(a) (amending 40 U.S.C. § 759(f)(5)).

[42] The GAO recently issued a report listing the range of attorneys' fees charged to government agencies in sustained protests. *See Attorney Fees Paid To Bid Protesters, FY 1992-1993*, 62 Fed. Cont. Rep. (BNA) 516-18 (Nov. 14, 1994) (report identified by the GAO as Fact Sheet GGD-95-17FS). Interestingly, the report revealed that 68% of the hourly rates charged the government by successful protesters exceeded $150. *Id. See also* Science Applications Int'l Corp., GSBCA No. 12696-C, 94-2 BCA ¶ 26,943 (board notes that hourly rates charged by major Washington, D.C., law firms in 1991 and 1992 ranged from $95 to $450). In the explanatory comments accompanying the Federal Acquisition Streamlining Bill, congressional conferees stated "that the $150 fee should be considered as a maximum, not a minimum." H.R. REP. NO. 712, 103d Cong., 2d Sess. 191, 193 (1994).

[43] FASA, *supra* note 1, §§ 1014 (amending 10 U.S.C. § 2305(B), 1402 (amending 31 U.S.C. § 3553), 1433 (amending 40 U.S.C. § 759(f)).

[44] *Id.* § 1402 (amending 31 U.S.C. § 3553(d)).

[45] 40 U.S.C. § 759.

the suspension hearing.[46] However, the FASA allows agencies to continue with "the procurement process up to but not including award of the contract."[47]

19. The GSBCA and Sanction Authority (FASA § 1434).— The GSBCA may dismiss a protest that is: (1) frivolous; (2) brought or pursued in bad faith; or (3) does not state on its face a valid basis for protest.[48] Although the board now has the express authority to dismiss protests for the above-stated reasons, it does not have the authority to impose monetary sanctions against offending parties.[49]

20. Publicity of Settlement Agreements (FASA § 1436).— As a result of the controversy that some protest settlement agreements amount to little more than "Fedmail,"[50] the FASA requires public disclosure of any settlement agreement that provides for the dismissal of a protest and involves a direct or indirect expenditure of appropriated funds.[51] Such an agreement *shall* be submitted to the GSBCA with a memorandum, signed by the contracting officer, detailing:

a. the procurement;

b. the grounds for protest;

c. the "Federal Government's" position regarding the grounds for protest;

d. the terms of the settlement; and

e. the "agency's" position regarding the propriety of the award or proposed award of the contract at issue.

Under this provision, agencies are authorized to make settlement payments from the judgment fund.[52]

21. Undefinitized Contractual Actions (FASA § 1505).— The FASA changes the limitations pertaining to undefinitized contractual actions from a limit on the amount expended to a limit on the amount obligated.[53] Previously, a contracting officer could not "expend" over a certain percentage of the ceiling price prior to definitization. The FASA amends the statute to express the limitations in terms of the amount obligated.[54] The FASA also adds a new provision authorizing an agency head to waive these limitations when necessary to support a contingency operation.

22. Special Tooling and Special Test Equipment (ST/STE) Costs (FASA § 1506).—A statutory requirement to amortize ST/STE costs no longer exists.[55] Formerly, if the contracting officer believed that a contractor could use ST/STE on follow-on contracts, the contracting officer could not reimburse the contractor for the full price of the ST/STE, but instead had to establish an amortization schedule.[56] Under the new rules, agencies have the flexibility to determine how to reimburse their contractors for ST/STE.[57]

---

[46] *Id.* § 759(f)(2). *See also* Sun Microsystems Fed., Inc. v. Department of the Navy, GSBCA No. 12795-P, 94-2 BCA ¶ 26,881 (denying agency request for limited suspension to evaluate proposals, because award would not occur within 30 days of the suspension hearing).

[47] FASA, *supra* note 1, § 1433 (amending 40 U.S.C. § 759(f)). This provision also states that the agency would be precluded from undertaking such action if the board determines continuation would not be in the best interests of the United States.

[48] *Id.* § 1434 (amending 40 U.S.C. § 759(f)(4)).

[49] *Id. See also* Integrated Sys. Group v. Department of the Treasury, GSBCA No. 11336-C(11214-P), 1994 WL 642438 (Nov. 4, 1994) (board analyzes authority under the FASA and determines that it "clearly" does not have authority to impose monetary sanctions).

[50] "Fedmail" is defined as a settlement agreement when the agency pays a protester to withdraw a protest without having secured any relief otherwise available under statute. ICF Severn, Inc. v. NASA, GSBCA No. 11552-C-R(11334-P), 92-1 BCA ¶ 24,736, *recon. denied*, 94-3 BCA ¶ 27,162. *See infra* note 594 and accompanying text.

[51] FASA, *supra* note 1, § 1436 (amending 40 U.S.C. § 759(f)(5)).

[52] *Id.*

[53] *Id.* § 1505 (amending 10 U.S.C. § 2326(b)).

[54] *Id.* The amount obligated is within the control of the contracting community, whereas the amount expended is not. *See* DEP'T OF DEFENSE, REPORT OF THE ACQUISITION LAW ADVISORY PANEL, STREAMLINING DEFENSE ACQUISITION LAWS, 1-305 (1993) [hereinafter Section 800 Panel Report]. *Federal Acquisition Regulation* 16.603-2 defines the government's maximum liability as 50% of the estimated cost of the definitized contract, which is equivalent to the amount obligated. *See also* DEP'T OF DEFENSE, DOD ACCOUNTING MANUAL 7220.9-M, ch. 25, para. B.2.b (Oct. 1983).

[55] FASA, *supra* note 1, § 1506 (repealing 10 U.S.C. § 2329).

[56] 10 U.S.C. § 2329(c)(2). This requirement was a product of the military buildup of the 1980s. Because follow-on production contracts were likely, Congress believed it could encourage contractor frugality by requiring amortization over the useful life of the ST/STE, rather than charging the entire cost to a single contract. *See* Section 800 Panel Report, *supra* note 54, at 1-310.

[57] The DOD presently implements the prescriptions of the former 10 U.S.C. § 2329 at *DFARS* 215.871-4.

23. Repeal of Preference for Recycled Toner Cartridges (FASA § 1554).—Over the last several years, Congress has encouraged agencies to use recycled toner cartridges in photocopiers, laser printers, and other similar equipment.[58] The FASA repeals the statutory preference for use of such cartridges.[59]

B. Contract Administration

1. Performance-Based Financing Payments (FASA § 2001).—Whenever practicable, agencies must now make financing payments[60] based on performance. The statute states that performance must be measured by objective, quantifiable methods such as: delivery of acceptable items, work measurement, or statistical process controls; accomplishment of events defined in the program management plan; or any other quantifiable measure of results.[61] Progress payments generally have been based on the contractor's incurred costs,[62] although, in limited circumstances, agencies also could make progress payments based on the stage or level of completion of contract work.[63] Under the new rules, agencies must make performance-based financing payments (whenever practicable) in all contracts.

2. Payments for Commercial Items (FASA § 2001).—Agencies may now make payments under contracts for commercial items using terms and conditions "appropriate or customary in the commercial marketplace."[64] Such terms may include advance payments of not more than fifteen percent of the total contract price, before starting performance under the contract.[65] The agency must obtain "adequate security" for payments made in accordance with such terms.[66] This security may include a lien in favor of the United States.[67]

3. Changes to Cost Allowability Rules (FASA §§ 2191, 2192, 2201).—In addition to raising the threshold for a "covered contract" from $100,000 to $500,000,[68] the FASA repealed or amended several provisions pertaining to specific categories of costs. Section 2191 of the FASA repealed 41 U.S.C. § 420, which dealt with the allowability of travel expenses.[69] The effect of 41 U.S.C. § 420 was to reimburse a contractor for its employee's travel expenses at a rate no greater than that which a government employee would receive.[70] The Section 800 Panel recommended repeal so that agencies could address travel cost allowability through regulations unfettered by statutory prescriptions.[71]

---

[58] *See* Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, § 630, 106 Stat. 1729, 1773-74 (to be codified at 42 U.S.C. § 6962j); Treasury, Postal Service, and General Government Appropriations Act, 1994, Pub. L. No. 103-123, § 401, 107 Stat. 1226, 1238-39.

[59] FASA, *supra* note 1, § 1554.

[60] The term "financing payments" means different things in different contexts. The FASA intends the term to include "advance, partial, progress, or other payments under contracts for property or services made by the agency." *Id.* § 2001(a). *Compare* FAR 32.902 (including interim payments under cost-reimbursement contracts under the definition of financing payments) *with* Technology for Communications Int'l, ASBCA No. 36265, 93-3 BCA ¶ 26,139 *and* Northrop Worldwide Aircraft Servs., Inc. v. Department of Treasury, GSBCA No. 11162-TD, 92-2 BCA ¶ 24,765 (holding that interim payments under cost-reimbursement contracts are *not* financing payments).

[61] FASA, *supra* note 1, § 2001(b).

[62] *See generally* FAR subpt. 32.5, Progress Payments Based on Costs.

[63] In the DOD, this type of progress payment is authorized only for contracts for construction, shipbuilding, and ship conversion, alteration, or repair. DFARS 232.102(e)(2). The proposed implementing *FAR* provisions (*see* FAR Case 94-764) exclude this type of progress payment from the scope of proposed *FAR* subpart 32.10, Performance-Based Payments for Events.

[64] FASA, *supra* note 1, § 2001 (amending 10 U.S.C. § 2307).

[65] *Id.*

[66] *Id.*

[67] *Id.* The FASA states that such a lien shall be "paramount to all other liens and [be] effective immediately upon the first payment, without filing, notice, or other action by the United States." Query what effect such language will have when the government's lien is contested by a creditor with a previously perfected security interest in the contractor's property. *See* U.C.C. art. 9 (1978). *See also* Marine Midland Bank v. United States, 687 F.2d 395 (Ct. Cl. 1982) (discussing the nature of the government's interest in progress payment inventory).

[68] A "covered contract" is subject to the cost allowability provisions of 10 U.S.C. § 2324 and *FAR* part 31.

[69] This section was effective on enactment. FASA, *supra* note 1, § 10001(c).

[70] Industry groups opposed this limitation because, unlike government entities, they could not take advantage of lower government travel rates.

[71] *See* Section 800 Panel Report, *supra* note 54, at 2-65. Note that *FAR* 31.205-46, Travel costs, still limits contractors' allowable travel expenses to government per diem rates, with some exceptions. With repeal of 10 U.S.C. § 420, this cost principle may be amended or repealed. *See, e.g.*, Memorandum, Gregory A. Smith, Chairman of the Acct'g and Cost and Pricing Comm., Pub. Cont. Law Section, Am. Bar Ass'n, subject: Repeal of Statutory Limit on Travel Costs (Oct. 24, 1994) (advocating preparation of a specific recommendation to repeal *FAR* 31.205-46).

Congress directed the FAR Council to amend the *FAR* cost principle dealing with entertainment costs[72] to clarify that unallowable entertainment expenses are not allowable under other cost principles.[73] If the FAR Council wants to allow exceptions to the general unallowability of entertainment costs,[74] it must amend the *FAR* to so provide within 120 days of the FASA's enactment.[75]

The FASA expanded the authority of executive agencies and the Comptroller General to audit contractors' records.[76] Executive agencies now have statutory authority to audit the records of contractors performing any cost-reimbursement contract (formerly this authority extended only to cost or cost-plus-fixed-fee contracts),[77] as well as incentive, time-and-materials, labor-hour, and price-redeterminable contracts.[78]

4. Claims Certification (FASA § 2351(b)).—In concert with the revisions in other procurement-related dollar limitations, the FASA increases the Contract Disputes Act (CDA) claim certification threshold from $50,000 to $100,000.[79]

5. Statute of Limitations for Claims (FASA § 2351).—The FASA now incorporates a six-year statute of limitations, computed from the date of "accrual of the claim."[80] This provision does not apply to government claims against fraudulent contractor claims.

6. Accelerated and Expedited Procedures (FASA § 2351(c)-(d)).—The FASA increases the threshold for accelerated cases (*i.e.*, decisions issued by the Armed Services Board of Contract Appeals (ASBCA) within 180 days) from $50,000 to $100,000.[81] Similarly, the threshold for expedited disputes (*i.e.*, decisions issued within 120 days) is increased from $10,000 to $50,000.[82]

7. Advisory Opinions for District Courts (FASA § 2354).—The FASA authorizes United States federal district courts to request the pertinent board of contract appeals to provide an advisory opinion "on matters of contract interpretation" in a "timely manner."[83] The provision defines contract interpretation matters as any issue that could be the proper subject of a contracting officer's final decision.[84]

8. The FASA Amends Assignment of Claims Act (FASA § 2451).—The FASA also amended the Assignment of Claims Act,[85] marking the first time since 1951 that Congress changed the rules governing assignment of claims.[86] The amendment updated references to certain federal agencies,[87]

---

[72] FAR 31.205-14.

[73] FASA, *supra* note 1, § 2192. This is to preclude contractors from charging unallowable entertainment expenses as morale, health, and welfare costs, which generally are allowable. *See* FAR 31.205-13.

[74] *See* 10 U.S.C. § 2324(e)(1)(A).

[75] FASA, *supra* note 1, § 2192(a).

[76] *Id.* § 2201 (amending 10 U.S.C. § 2313 and repealing 10 U.S.C. § 2406). FASA § 2201 merges the audit provisions of the TINA (10 U.S.C. § 2306(f)) with 10 U.S.C. § 2313 (Examination of Books and Records of Contractor) and 10 U.S.C. § 2406 (Availability of Cost and Pricing Records). It also aligns the rules pertaining to civilian and defense contracts.

[77] 10 U.S.C. § 2313(a)(1).

[78] The impact of this expansion on the Comptroller General's authority to audit records is not as great, because, under 10 U.S.C. § 2313(b), the Comptroller had authority to audit records pertaining to any contract awarded "using procedures other than sealing bidding." In a related matter, FASA § 6009 requires federal agencies to resolve or take corrective action on all Office of the Inspector General audit report findings within six months after issuance of the report.

[79] FASA, *supra* note 1, § 2351 (amending 41 U.S.C. § 605(c)(1)).

[80] FASA § 2351 (amending 41 U.S.C. § 605(a)). This provision corrects an apparent oversight in the original statutory language such that no definitive statute of limitations applied to CDA claims. *See* Pathman Constr. Co. v. United States, 817 F.2d 1573, 1580 (Fed. Cir. 1987).

[81] FASA, *supra* note 1, § 2351(c) (amending 41 U.S.C. § 607(f)).

[82] *Id.* § 2351(d) (amending 41 U.S.C. § 607(d)).

[83] *Id.* § 2354 (amending 41 U.S.C. § 609).

[84] *Id.*

[85] 41 U.S.C. § 15.

[86] FASA, *supra* note 1, § 2451.

[87] For example, the amendments replaced "Atomic Energy Commission" with "Department of Energy."

reorganized the statute for clarity, and deleted references to pre-1951 conditions.[88] The amendment also gave the President power to determine that payments to assignees would not be subject to reduction or setoff, so long as the President published the determination in the *Federal Register*.[89]

9. Uniform Suspension and Debarment (FASA § 2455).—Debarment, suspension, or other exclusion of an entity from procurement activities under the *FAR*,[90] or from a nonprocurement program,[91] now will have government-wide effect.[92]

C. Service and Major Systems Statutes

1. Major Systems Statutes Revised (FASA §§ 3001, 3004, 3005, 3014).—Recognizing the decreased number of weapon systems that the DOD will develop or procure under the Future Years Defense Plan, a quantitative drop that makes facilitization of alternate producers for new systems impracticable and prohibitively expensive, Congress has deleted statutory requirements for competitive prototyping and alternate source consideration in the management of major systems.[93] However, Congress retains a keen interest in program management, and has imposed or revised a number of reporting requirements, including: (1) reports to Congress concurrent with each budget submission addressing the most efficient production rate and the minimum sustaining rate for each major weapon system;[94] (2) consideration by the Secretary of Defense of an independent manpower and cost report for each program at the time that the DOD makes an engineering and manufacturing development or production decision;[95] and (3) new teeth in the requirement for program baselines, and for program manager reports of deviations in a program's baseline cost, schedule, or performance, by prohibiting the obligation of any funds for a program in or beyond engineering and manufacturing development if it does not have an approved baseline, unless the obligation is approved by the Under Secretary of Defense (Acquisition and Technology).[96]

Finally, Congress provided a specific statutory exception from the live-fire testing requirements applicable to major systems. Survivability and lethality testing now may be directed only at components and subsystems of weapons, or design analyses and simulations may substitute for such tests entirely, if the Secretary of Defense certifies to Congress before engineering development that such testing would be impracticable and unreasonably expensive.[97]

2. The FASA Clarifies the DOD's Right to Buy Computer Software (FASA § 3063).—For the first time, Congress has specifically recognized the DOD's authority to purchase computer software as ordinary supplies.[98] The new provision authorizes the DOD to purchase technical data and computer software and to pay for releases for past unauthorized use of technical data or computer software.

3. DOD May Purchase Soft Drinks from Exchanges (FASA § 3066).—Under GAO decisional law, appropriated fund activities may not contract with nonappropriated fund instrumentalities (NAFIs) except under very limited circumstances.[99] However, in 1989, Congress created a statutory exception allowing overseas DOD elements to purchase goods from overseas exchanges, so long as: (1) the purchase did not

---

[88] For example, references to pre-1940 contracts were deleted.

[89] Previously, this power only could be exercised during a declared war (such as World War II), or during a period of national emergency declared by the President (such as the Korean conflict). This change renders irrelevant the reference to 41 U.S.C. § 15 found at 50 U.S.C. § 1651(a). That reference excluded the assignment of the claims statute from the procedural requirements associated with proclaiming a national emergency or war. Because this proclamation no longer is required, the nonapplicability of associated procedural requirements is moot.

[90] *See* FAR pt. 9.

[91] *See* Exec. Order No. 12,549, 51 Fed. Reg. 6370 (1986).

[92] FASA, *supra* note 1, § 2455.

[93] *Id.* §§ 3006-3007 (repealing 10 U.S.C. §§ 2438-2439).

[94] *Id.* § 3001 (amending 10 U.S.C. § 2431). *See also id.* § 3002, 108 Stat. at 3328 (amending 10 U.S.C. § 2432, and requiring *quarterly* status reports to Congress on certain programs).

[95] *Id.* § 3004 (amending 10 U.S.C. § 2434).

[96] *Id.* § 3005 (amending 10 U.S.C. § 2435).

[97] *Id.* § 3014 (amending 10 U.S.C. § 2366c).

[98] *Id.* § 3063 (amending 10 U.S.C. § 2386).

[99] Usually, the circumstances involve purchases from the NAFI on a "sole-source" basis. *See* Departments of the Army and the Air Force, Army and Air Force Exchange Serv., B-235742, Apr. 24, 1990, 90-1 CPD ¶ 410.

exceed $50,000; (2) the purchase was from stock on hand at the exchange; and (3) the goods purchased were goods normally sold by the exchange.[100] The FASA now expands this statutory exception to remove the $50,000 ceiling and the stock-on-hand requirement for purchases of "soft drinks that are manufactured in the United States."[101] Under the new provision, the Secretary of Defense must promulgate regulations defining "soft drinks" and "manufactured in the United States."

D. Simplified Acquisition Threshold

The FASA made significant changes in the law concerning purchases of goods and services costing $100,000 or less. In some cases, the FASA changed previous statutory guidance, while in other cases the FASA codified prior regulatory and decisional law. Most of the changes are not effective until implementing regulations take effect.[102]

1. New Simplified Acquisition Threshold (FASA § 4001).—The FASA established a new "simplified acquisition threshold" of $100,000[103] for all federal agencies.[104] This will replace the $25,000 "small purchase threshold" currently in effect.[105] For agencies that do not have the ability to perform certain procurement functions electronically,[106] however, the "simplified acquisition threshold" is $50,000 until the agency achieves the required electronic capability.[107] The "simplified acquisition threshold" is double the normal threshold for DOD contracts or purchases outside the United States, in support of contingency operations.[108] Finally, the FASA retains the small business reservation for all acquisitions between $2500 and $100,000.[109]

2. New Simplified Acquisition Procedures (FASA § 4201).—The FASA requires *FAR* amendments describing "special simplified procedures for contracts for acquisition of property and services that are not greater than the simplified acquisition threshold."[110] It retains the statutory prohibition against splitting requirements to use simplified acquisition procedures, and requires contracting officers to use simplified procedures to the maximum extent practicable.[111]

3. Changes to CBD *Notice Requirements (FASA § 4202).*—The requirement to synopsize proposed acquisitions greater than $25,000 in the *Commerce Business Daily (CBD)* remains under the FASA. However, agencies no longer must allow thirty days between issuing the Invitation for Bids (IFB) and bid opening, for acquisitions greater than $25,000 but less than the new simplified acquisition threshold.[112] Instead, agencies awarding such contracts must include in the applicable *CBD* notice a description of the procedures that the agency will use to award the contract and of the relevant time periods involved in the acquisition.[113] Finally, once an agency can perform certain procurement functions electronically, the

---

[100] 10 U.S.C. § 2424.

[101] FASA, *supra* note 1, § 3066.

[102] *Id.* § 10001.

[103] *Id.* § 4001.

[104] Section 4002 of the FASA makes the new definition applicable to the DOD, the Coast Guard, and NASA, while FASA § 4003 makes the new definition applicable to all other federal agencies.

[105] A number of FASA provisions amend various statutes by substituting "for an amount not greater than the simplified acquisition threshold" for "small purchase threshold." *See, e.g.*, FASA §§ 4102, 4103, 4401.

[106] *See id.*, tit. IX, §§ 9001-9004, for a detailed list of functions that agencies must perform electronically.

[107] *Id.* § 4201.

[108] *Id.* § 1502(2) (amending 10 U.S.C. § 2302(7)). This means that the current DOD small purchase contingency contracting threshold of $100,000 remains unchanged initially, but increases to $200,000 when the DOD achieves the FASA's requirements for performing certain procurement functions electronically.

[109] *Id.* § 4004 (amending 15 U.S.C. § 644(j)). The FASA requires the contracting officer to reserve acquisitions between $2500 and $100,000 exclusively for small business concerns, unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices. *Id.*

[110] *Id.* § 4201.

[111] *Id. See also* 10 U.S.C. § 2304(g).

[112] FASA § 4202(a) (amending 41 U.S.C. § 416(a)(3)(B)).

[113] *Id.* § 4202(b).

CBD notice requirement ends.[114] The FASA also amended the Small Business Act[115] to reflect the above changes.[116]

4. Statutory Exemptions (FASA §§ 4101-4104).—To simplify acquisitions under $100,000, the FASA amended several procurement statutes to make them inapplicable to acquisitions using simplified acquisition procedures.[117] These statutes include the prohibition against contingent fees,[118] the prohibition against contracting with suspended or debarred contractors,[119] the Miller Act,[120] the Contract Work Hours and Safety Standards Act,[121] and the Drug-Free Workplace Act of 1988.[122]

5. New "Micropurchase" Procedures (FASA § 4301).—The FASA authorizes a new set of procedures for "micropurchases," which the statute defines as purchases of $2500 or less.[123] Micropurchases are exempt from the small business "set-aside" requirements of the Small Business Act[124] and the Buy American Act.[125] Additionally, micropurchases do not require competitive quotations if the contracting officer believes that the price obtained is reasonable.[126] However, the statute does require the contracting officer to distribute micropurchases equitably among qualified suppliers.[127] Unlike most other FASA provisions, the micropurchase rules became effective on the FASA's enactment.[128] The Clinton Administration has urged agencies to take full advantage of the new rules, particularly in the use of government credit cards.[129]

E. Other Procurement-Related Matters

1. Postemployment Restrictions (FASA § 6001).—The FASA repeals 37 U.S.C. § 801.[130] The FASA also suspends the effect of 18 U.S.C. § 281 through December 31, 1996.[131] Both provisions became effective on the FASA's enactment.[132]

2. Limitation on Use of Advisory and Assistance Services (FASA § 6002).—The FASA amends the Office of Federal Procurement Policy (OFPP) Act[133] to add a section limiting

---

[114] *Id.* § 4202(c).

[115] 15 U.S.C. § 637.

[116] FASA, *supra* note 1, § 4202(d) (amending portions of 15 U.S.C. § 637).

[117] *Id.* §§ 4101-4104.

[118] 10 U.S.C. § 2306(b); 41 U.S.C. § 254(a).

[119] 10 U.S.C. § 2393(d).

[120] 40 U.S.C. §§ 270a-270f.

[121] *Id.* § 329.

[122] 41 U.S.C. § 701(a)(1).

[123] FASA, *supra* note 1, § 4301(g).

[124] 15 U.S.C. § 644(j).

[125] 41 U.S.C. §§ 10a-10c. Section 4301(b) of the FASA makes a conforming amendment to the Buy American Act.

[126] FASA, *supra* note 1, § 4301(a). This provision codifies previous GAO decisional law. *See* Northern Va. Football Officials Ass'n, B-231413, Aug. 8, 1988, 88-2 CPD ¶ 120.

[127] FASA, *supra* note 1, § 4301(a). *Federal Acquisition Regulation* 13.106 already required contracting officers to distribute equitably noncompetitive purchases among qualified sources. *See also* Grimm's Orthopedic Supply & Repair, B-231578, Sept. 19, 1988, 88-2 CPD ¶ 258.

[128] The President signed the FASA into law on October 13, 1994.

[129] *See* Memorandum, Adm'r, Office of Federal Procurement Policy, to Senior Procurement Executives and the Deputy Under Secretary of Defense for Acquisition Reform, subject: Authority for Micropurchases (Oct. 13, 1994).

[130] FASA, *supra* note 1, § 6001. 37 U.S.C. § 801 prohibited retired regular officers from selling tangible property to any DOD agency or activity.

[131] FASA, *supra* note 1, § 6001. 18 U.S.C. § 281 prohibits retired officers, within two years of their retirement, from representing another in connection with the sale of anything to the department in which they hold retired status, or from prosecuting certain claims against the United States.

[132] *See* FASA, *supra* note 1, § 10001(c).

[133] 41 U.S.C. §§ 401-420.

the use of advisory and assistance services.[134] Agencies may not contract for services to conduct evaluations or analyses of a proposal submitted for an acquisition unless the agency can certify that federal employees are "not readily available" to perform such functions.[135] Congress directed the OFPP to issue guidance for agencies to use in determining whether federal employees are readily available.

F. Small Business and Socioeconomic Laws

1. Requirement to Set Aside Acquisitions for Labor Surplus Area Concerns Eliminated (FASA § 7101).—The FASA repeals provisions of the Small Business Act requiring agencies to set aside acquisitions for small business concerns located in labor surplus areas.[136] Despite the elimination of the set-aside requirement, however, agencies still must give priority to awarding contracts and subcontracts to labor surplus area concerns.[137] This change will have minimal impact on DOD contracting activities because the DOD generally is prohibited from using appropriated funds to pay a price differential to relieve economic dislocations.[138]

2. Certificate of Competency Procedures (FASA § 7101).—The National Defense Authorization Act for Fiscal Year 1993[139] provides that when a DOD, NASA, or Coast Guard contracting officer determines a small business to be nonresponsible, the contracting officer must notify the small business in writing of the determination and of the firm's right to request a review by the Small Business Administration (SBA). If the small business requests SBA review within fourteen days of notification, the contracting officer must forward the matter to the SBA for a determination of whether to issue a certificate of competency. The FASA eliminates this additional notification requirement;[140] now all federal agencies must refer automatically all nonresponsibility determinations of small businesses to the SBA for review under certificate of competency procedures.[141]

3. Small Disadvantaged Business (SDB) Set-Asides and Goals (FASA §§ 7102, 7105).—The DOD has long had the authority to set aside acquisitions exclusively for SDBs, and to award contracts to SDBs for up to ten percent above fair market price.[142] The FASA extends this authority to civilian agencies, permitting agencies to restrict competition to SDBs and provide SDBs a price evaluation preference up to ten percent when using an unrestricted competition.[143] The FASA further extends this authority to NASA and the Coast Guard,[144] along with the DOD's goal of awarding five percent of its contract dollars to SDBs.[145]

4. Extension of Contract Goals to Women-Owned Concerns (FASA § 7106).—The FASA establishes a new, government-wide goal of awarding five percent of the total value of all prime contracts and subcontracts to small business concerns owned and controlled by women.[146] This new goal will apply to small business concerns that are at least fifty-one percent owned by women, and whose management and daily operations are controlled by women.[147]

---

[134] FASA, *supra* note 1, § 6002.

[135] *Id.* For Army acquisitions of such services, a similar determination already is required as part of the Management Decision Document supporting award of an advisory and assistance contract. *See* DEP'T OF ARMY, REG. 5-14, MANAGEMENT OF CONTRACTED ADVISORY AND ASSISTANCE SERVICES, para. 4-3b (15 Jan. 1993).

[136] FASA, *supra* note 1, § 7101 (repealing 15 U.S.C. § 644(e), (f)). A labor surplus area is a geographic area of high unemployment, as determined by the Department of Labor. *See* 20 C.F.R. § 654 (1994).

[137] *See* 15 U.S.C. § 644(d).

[138] 10 U.S.C. § 2392. *But see* FAR 20.201-2 (authorizing set-asides for labor surplus area concerns for contracts funded by Military Construction Appropriation Acts).

[139] Pub. L. No. 102-484, § 804, 106 Stat. 2315, 2447 (1992).

[140] FASA, *supra* note 1, § 7101(b).

[141] *See* FAR 19.602-1.

[142] *See* 10 U.S.C. § 2323(e)(3); DFARS 219.502-2-70.

[143] FASA, *supra* note 1, § 7102(a).

[144] *Id.* § 7105 (amending 10 U.S.C. § 2323(e)(3) to permit NASA and the Coast Guard to enter contracts using less than full and open competitive procedures, but prohibiting agencies from paying a price exceeding fair market cost by more than ten percent).

[145] *Id.* § 7105 (amending 10 U.S.C. § 2323(a) to establish a goal for the DOD, NASA, and Coast Guard to award five percent of their contract dollars to SDBs, historically black colleges and universities, and minority institutions).

[146] *Id.* § 7106(a) (amending 15 U.S.C. § 644(g)).

[147] *Id.* § 7106(b)(3) (amending 15 U.S.C. § 637(d)(3)).

5. Walsh-Healey Act Amended (FASA § 7201).—The FASA amends the Walsh-Healey Public Contracts Act[148] by eliminating the requirement that contractors must be regular dealers or manufacturers of the items to be furnished under a contract.[149]

G. Commercial Items

1. Definitions, Implementation (FASA §§ 8001-8003).—The FASA adds to the OFPP Act a series of definitions related to commercial items.[150] These definitions are similar to those currently set out in the DFARS;[151] however, the FASA includes services in the definition of "commercial items." Additionally, "commercial items" now include "nondevelopmental items,"[152] developed exclusively at private expense, that have been sold in substantial quantities to multiple state and local governments.

Implementing regulations must include a list of contract clauses applicable to contracts for commercial items.[153] The regulations also must include a provision authorizing agencies to require offerors to demonstrate that their products meet certain "market acceptance" criteria.[154]

The FASA provides that, to the maximum extent practicable, agencies must use firm-fixed-price contracts or fixed-price contracts with economic price adjustments for commercial items.[155] The FASA prohibits cost-type contracts for commercial items.[156]

Implementing regulations must include a list of statutes that are inapplicable to commercial items contracts.[157] The FASA provides procedures for dealing with laws enacted after the effective date of the FASA and contains a provision allowing persons to petition the Administrator of the OFPP to add laws to the list.[158]

Agencies must permit, to the maximum extent practicable, a contractor under a commercial items contract to use its existing quality assurance system as a substitute for government inspection or testing prior to tendering the items to the government.[159] Additionally, agencies must take advantage of warranties offered on commercial items to the maximum extent practicable and must use these warranties for the repair and replacement of commercial items.[160]

2. Procurement of Commercial Items (FASA §§ 8101-8106).—The FASA adds a new chapter to 10 U.S.C., governing the DOD, Coast Guard, and NASA acquisitions of commercial items.[161]

3. "Commercial Items" Definition Expanded (FASA §§ 8100, 8102).—The FASA expands the definition of "commercial items" to include services. Accordingly, the "catalog or market price" TINA exemption also covers services performed at catalog or market prices.[162]

4. Preference for Commercial Items (FASA § 8104).—The FASA establishes a preference for the acquisition of commercial items.[163] Agencies must, to the maximum extent practica-

---

[148] 31 U.S.C. §§ 35-45.

[149] FASA, *supra* note 1, § 7201.

[150] *Id.* § 9001 (amending 41 U.S.C. § 403).

[151] *See* DFARS 211.7001.

[152] *See* FASA, *supra* note 1, § 8001.

[153] The *DFARS* already includes such a list. *See* DFARS 211.7005.

[154] FASA § 8002. For example, whether offered items have "been satisfactorily supplied to an executive agency under current or recent contracts for the same or similar requirements."

[155] *Id.*

[156] *Id. Defense Federal Acquisition Regulation Supplement* 211.7004-1(b) currently provides that only fixed-price or fixed-price with economic price adjustment contracts may be used to acquire commercial items.

[157] FASA, *supra* note 1, § 8003.

[158] *Id.*

[159] *Id.* § 8002. *Defense Federal Acquisition Regulation Supplement* 211.7004-1 contains a similar provision.

[160] FASA, *supra* note 1, § 8002.

[161] *Id.* § 8101 (adding chapter 140 to 10 U.S.C.).

[162] *Id.* §§ 8001 (amending 41 U.S.C. § 403), 8102 (to be codified at 10 U.S.C. § 2375).

[163] *Id.* § 8104 (adding 10 U.S.C. § 2377).

ble: (1) state requirements in terms of functions to be performed, performance required, or essential physical characteristics;[164] (2) define requirements so that activities may purchase commercial items to fulfill the requirements; and (3) ensure that activities provide contractors offering commercial items an opportunity to compete for requirements.[165]

5. Requirement for Market Research (FASA § 8104).—Agencies must conduct market research "appropriate to the circumstances" before developing new specifications for a procurement and before soliciting bids or proposals for a contract exceeding the simplified acquisition threshold.[166] Agencies must use the results of this market research to determine whether commercial items exist that: (1) meet the agency's requirements; (2) could be modified to meet the requirements; or (3) could meet the requirements if the agency modified its requirements "to a reasonable extent."[167] Agencies should not require potential sources to submit more than the minimum amount of information needed to make these determinations.

6. Inapplicable Laws (FASA § 8105).—The FASA contains a series of amendments making various statutes inapplicable to commercial items contracts.[168] Provisions that no longer apply to such contracts include: the requirement for a contract clause regarding contingent fees;[169] the requirement to identify sources of supply;[170] and the prohibition against doing business with certain subcontractors.[171]

7. Technical Data (FASA § 8106).—The FASA establishes a rebuttable presumption that items delivered under a contract for commercial items were developed at private expense.[172] If the DOD challenges a contractor's assertion that commercial items were developed at private expense, the DOD now bears the burden of demonstrating that the items were not developed at private expense.[173] This is a significant change to the current procedures for challenging a contractor's attempt to restrict the government's use of technical data.[174]

III. Department of Defense Legislation

"Preserving Military Readiness"[175] was a recurring theme in this year's DOD legislation. Just as there are "growing pains," the DOD has experienced what can best be described as "down-sizing pains."[176] Over the past few years, Congress, the Clinton Administration, and the DOD have struggled to reduce the defense budget while maintaining an adequate force readiness level—all while national security interests undergo their own metamorphosis. Congress repeatedly expressed its concern about the ability of the Armed Forces to respond to the many new, and often unanticipated, missions of the post-Cold War era, and noted an "aura of urgency" in packaging the defense authorization and appropriations bills for Fiscal Year (FY) 1995.[177]

---

[164] *Cf.* FAR 10.002. *See infra* note 1006 and accompanying text.

[165] FASA, *supra* note 1, § 8104.

[166] *Id.*

[167] *Id.*

[168] *Id.* § 8105 (amending scattered sections of 10 U.S.C.).

[169] 10 U.S.C. § 2306(b).

[170] *Id.* § 2384(b).

[171] *Id.* § 2393(d).

[172] FASA, *supra* note 1, § 8106 (amending 10 U.S.C. § 2320(b)). The government receives only restricted rights in technical data pertaining to items developed at private expense. *See* 10 U.S.C. § 2320(a)(2)(B); DFARS 227.402-72.

[173] FASA, *supra* note 1, § 8106 (amending 10 U.S.C. § 2321).

[174] *See* 10 U.S.C. § 2321(d), (e); DFARS 227.403-73.

[175] S. REP. NO. 321, 103d Cong., 2d Sess. 30 (1994).

[176] For example, in its report, the Senate Appropriations Committee observed the following:

> Though it generally was understood at the beginning of the current military drawdown that inefficiencies and unanticipated costs would arise, no one could accurately predict the magnitude of those costs. Nowhere has this troublesome outcome had a more deleterious effect on current operations than in our European commands. Costs arising from the drawdown have forced our Army and Air Force leaders in Europe to redirect funds approved for training activities to infrastructure support. Thus, for the past 3 years, the U.S. Army in Europe has failed to train at levels even remotely akin to a reasonable readiness standard.

Id. at 36.

[177] *Id.*

A. National Defense Authorization Act for FY 1995

1. Introduction.—On October 10, 1994, President Clinton signed the National Defense Authorization Act for FY 1995 (1995 Authorization Act).[178] Some of the key provisions from the 1995 Authorization Act follow, to highlight how the new act will affect acquisitions and other operations within the DOD.

2. Preservation of United States Tank Industrial Base.—Congress agreed with a Defense Science Board recommendation that a United States tank industrial base should be preserved. Accordingly, Congress indicated in the conference report that funds were authorized for the Anniston Army Depot and the contractor-operated Stratford Army Engine Plant for the development and upgrade of depot activities related to the manufacturing and servicing of tank engines.[179]

3. Prohibition Regarding Procurement of Helicopters Relaxed.—In the Authorization Acts for FYs 1990 and 1991, Congress prohibited any future purchase of the AH-64 Apache helicopter and the OH-58D Kiowa Warrior scout helicopter.[180] This year Congress relaxed the restrictions on continuing the AH-64 and OH-58D programs, allowing the purchase of a limited number of the aircraft.[181]

4. C-17 Settlement Claims Approved.—Congress specifically approved the payment of funds pursuant to the settlement of contractor claims arising under the C-17 transport program.[182] In recommending such payment, the Senate report noted its desire that the settlement agreement "promote progress in a . . . program characterized by cost overruns, schedule slippages, and performance problems."[183]

5. Authority for Army Industrial Facilities to Sell Commercial Articles and Services.—Congress expanded the authority of Army industrial facilities, including arsenals, to allow the sale of commercial articles and services to persons outside the DOD, if the Secretary of the Army determines such articles or services are not otherwise available from a United States commercial source.[184]

6. Federally Funded Research and Development Centers (FFRDCs).[185]—For the past few years, both the House and Senate have expressed concerns about management and funding problems associated with FFRDCs.[186] Specifically, lawmakers have questioned the practice of providing salaries and benefits to FFRDC employees that exceed those of comparable government and private industry employees.[187] Consequently, Congress limited salaries and compensation for FFRDC personnel to existing levels and restricted the manner in which federal funds paid to the centers may be used.[188] To further underscore its concern on this matter, Congress also reduced, by more than $52 million, the amount requested in the President's budget for FFRDCs.

7. Funding of Depot-Level Maintenance Programs.—Congress continued to express its concern about the apparent lack of a depot maintenance strategy for preserving a "secure and accountable depot maintenance policy for the future."[189] Congress noted the dual importance of maintaining an adequate military industrial base for responding to current threats, while simultaneously preserving public/private competition to reduce overall maintenance and repair costs. In this vein, Congress added $305 million to the depot maintenance program above that requested by the Administration,[190] and provided permanent authority for DOD depot activities to

---

[178] Pub. L. No. 103-337, 108 Stat. 2663 (1994).

[179] H.R. CONF. REP. NO. 701, 103d Cong., 2d Sess. 480 (1994).

[180] The National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, §§ 132-133, 103 Stat. 1382 (1989).

[181] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 117, 108 Stat. 2663, 2682 (1994).

[182] *Id.* § 132, 108 Stat. at 2685.

[183] S. REP. NO. 282, 103d Cong., 2d Sess. 54 (1994). Indeed, it appears that many of the problems associated with the program are behind the contractor. By November 1994, McDonnell-Douglas was providing the Air Force the C-17 aircraft ahead of the contract delivery schedule. *See Air Force Under Secretary Hails Early Delivery of Newest C-17,* PR NEWSWIRE, Nov. 16, 1994.

[184] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 141, 108 Stat. 2663, 2688-89 (1994) (amending 10 U.S.C. § 4543(a)).

[185] Federally Funded Research and Development Centers are privately operated organizations sponsored by government agencies to work in all areas of basic or applied research.

[186] H.R. CONF. REP. NO. 701, 103d Cong., 2d Sess. 623 (1994).

[187] *Id.*

[188] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 217, 108 Stat. 2663, 2694-96 (1994).

[189] H.R. REP. No. 499, 103d Cong., 2d Sess. 163-65 (1994).

[190] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 304, 108 Stat. 2663, 2697 (1994). The House initially requested an increase of $600 million. H.R. REP. NO. 499, 103d Cong., 2d Sess. 225 (1994); H.R. CONF. REP. NO. 701, 103d Cong., 2d Sess. 674 (1994).

compete for depot maintenance and repair work of other federal agencies.[191] The measure also retains the current allocation of depot-level work between military maintenance facilities and private contractors (known as "the 60-40 split").[192]

8. Defense Business Operations Fund (DBOF).—Congress has made permanent the authority of the Secretary of Defense to operate the DBOF.[193] The services now may purchase, from a source other than the fund, goods and services available from DBOF activities. Concerned about the costs that the DBOF incorporates in its customer charges, Congress has prohibited[194] the DBOF from incorporating costs associated with activities related to the Base Realignment and Closure Act (BRAC).[195] Not completely convinced of the DBOF's fiscal soundness, Congress also has directed the Secretary of Defense and the Comptroller General to submit reports on the activities and efficacy of the DBOF as a business entity.[196]

9. Cost Comparison Studies for Advisory and Assistance Services.—Acting on a recent GAO report indicating the potential for considerable savings, Congress now requires the DOD to conduct a standardized cost comparison analysis before contracting out for advisory and assistance services in excess of $100,000.[197] The House suggested that the DOD follow a methodology similar to that required by *Office of Management and Budget* (OMB) *Circular A-76* in conducting the cost comparison.[198]

10. DOD Inspector General (DOD IG) to Review Cost Growth of A-76 Commercial Activity Contracts.—The DOD IG must review a "representative sample" of existing commercial activity contracts that were awarded based on an *OMB A-76* cost comparison study to determine whether contract costs have exceeded the costs estimated at the time of award.[199] The House indicated in its committee report that the DOD IG should review at least twenty percent of existing commercial activity contracts.[200]

11. Military Installations Required to Turn in Excess Morale, Welfare, and Recreation (MWR) Funds.—Congress singled out the Army when expressing its concern over the amount of nonappropriated fund (NAF) cash balances controlled at the installation level.[201] Concluding that consolidation of NAF cash reserves would better meet the service departments' program improvement and capital project needs, Congress has required all military departments to transfer excess nonappropriated MWR reserves from the installation to a single, department-wide nonappropriated MWR account.[202]

12. Operation of Overseas DOD Facilities by United States Firms.—In a "Sense of Congress" section,[203] Congress indicated that, to the maximum extent practicable, the DOD should give preference to United States firms in awarding contracts for the operation of overseas DOD facilities that provide goods and services to members of the Armed Forces and their dependents.[204]

---

[191] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 335, 108 Stat. 2716 (1994) (amending 10 U.S.C. § 2470).

[192] *Id.* § 332, 108 Stat. at 2707. *See also* 10 U.S.C. § 2466.

[193] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 311, 108 Stat. 2663, 2708-09 (1994) (amending 10 U.S.C. § 2208).

[194] *Id.*

[195] 10 U.S.C. § 2687.

[196] *Id.* §§ 311-312, 108 Stat. at 2708-10.

[197] *Id.* § 363, 108 Stat. at 2733-34 (to be codified at 10 U.S.C. § 2410).

[198] H.R. REP. No. 499, 103d Cong., 2d Sess. 170-71 (1994).

[199] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 364, 108 Stat. 2663, 2734 (1994).

[200] H.R. REP. No. 499, 103d Cong., 2d Sess. 171 (1994).

[201] Congress listed four specific concerns:

> First, while most of the cash is being held at installations, Army headquarters needs more money to finance centrally managed construction projects. Second, without central control, individual installations can obligate funds for capital improvements and construction projects that are not affordable or good investments. Third, installations may hold unnecessarily high balances to earn interest rather than to distribute the money to individual MWR activities. Fourth, commanders are tempted to apply excess cash to offset operation and maintenance shortfalls in legitimate appropriated fund areas.

Id. at 179 (1994).

[202] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 373, 108 Stat. 2663, 2736 (1994) (to be codified at 10 U.S.C. § 2219).

[203] In a "Sense of Congress" section, Congress highlights areas of congressional concern that frequently are addressed in subsequent authorization and appropriations acts.

[204] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 380, 108 Stat. 2663, 2738 (1994).

13. The "Vision Thing": Requirements for DOD's Automated Information Systems.—The focus and direction of the DOD's automated information system programs continue to concern Congress. Initially, the House recommended that Congress limit the scope of the DOD's information systems development and modernization efforts.[205] Congress subsequently agreed to a less drastic measure, however, directing the Secretary of Defense to develop performance measures and controls for supervising the development and modernization of those systems costing more than $50 million.[206] For the next three years, the Secretary must submit to Congress an annual report addressing these areas, and how the systems programs are contributing to the overall performance of the defense mission.[207]

14. Political Correctness of Limited Profitability: Military Recruiting on College Campuses.—Congress again directed that no institution of higher education denying or otherwise effectively preventing DOD agencies from recruiting on campus may receive DOD funds.[208] In coordination with the Department of Education, the DOD must establish procedures for identifying those educational institutions that discriminate against DOD recruiting efforts.[209]

15. New Factors Added to Buy American Act (BAA) Determinations.—The 1995 Authorization Act adds several new factors to be used when determining whether application of the BAA[210] is consistent "with the public interest."[211] Among the new factors that DOD agencies must consider when deciding whether to waive BAA restrictions are: the impact on the national technology industrial and employment base; maintaining a defense mobilization base; and national security interests.[212]

16. Analysis of Environmental Costs Associated with Major Acquisition Programs Required.—By April 1, 1995, the DOD must implement guidance requiring incorporation of environmental costs as an integral part of the life-cycle cost analysis of major defense system procurements.[213] Additionally, this guidance must explain how all DOD major systems acquisitions will comply with the National Environmental Policy Act of 1969 (NEPA).[214] The DOD also must establish a data base of all NEPA documentation prepared on major defense acquisition programs.[215]

17. Local Resident Preference Permitted for Contracts at Installations Affected by the BRAC.—When entering into contracts to be performed at BRAC-affected installations, agencies *may* accord preference to those contractors planning to use residents of the affected area to the maximum extent practicable.[216] Although this preference can apply to environmental contracts, the conferees indicated that restoration activity should not be delayed thereby.[217] This authority will expire at the end of FY 1997.

18. Allowability of Restructuring Costs Limited.—DOD agencies are prohibited from reimbursing a contractor for restructuring costs[218] associated with a business combination unless an official at the level of Assistant Secretary of Defense or above certifies in writing that the business combination

---

[205] H.R. REP. No. 747, 103d Cong., 2d Sess. 689 (1994).

[206] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 381, 108 Stat. 2663, 2738-40 (1994) (to be codified at 10 U.S.C. § 2219).

[207] *Id.*

[208] *Id.* § 558, 108 Stat. at 2776.

[209] *Id.*

[210] 41 U.S.C. §§ 10a-10d.

[211] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 812, 108 Stat. 2663, 2815-16 (1994) (amending 10 U.S.C. § 2533).

[212] *Id.*

[213] *Id.* § 815, 108 Stat. at 2819-20.

[214] 42 U.S.C. §§ 4321-4370a.

[215] *Id.*

[216] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 817, 108 Stat. 2663, 2820 (1994).

[217] H.R. CONF. REP. No. 701, 103d Cong., 2d Sess. 730-31 (1994).

[218] Restructuring costs result from a contractor's determination to change its organizational structure to address a declining contract base or to enhance business efficiencies. Examples of restructuring include downsizing, mergers, and acquisitions. Restructuring costs are those costs associated with such nonroutine, nonrecurring, or extraordinary events. *See generally* Memorandum, Defense Logistics Agency and the Defense Contract Audit Agency, to District Commanders (DCMC), Regional Directors (DCAA), and Director, Field Detachment (DCAA), subject: Guidance Paper on Restructuring Costs (Jan. 14, 1994) [hereinafter DLA/DCAA Memorandum].

should result in a net savings to the DOD.[219] The conferees stated that DOD policy should ensure that contracting officers make every reasonable effort to price the projected savings into current contracts, thereby increasing the likelihood that the DOD will realize actual savings.[220] Restructuring costs that are unallowable under a specific *FAR* cost principle[221] will not become allowable even if the restructuring is considered likely to result in a net savings to the DOD.[222]

19. Emergency Supplemental Authorizations of Appropriations for FY 1994.—Congress retroactively authorized supplemental appropriations for FY 1994 for DOD costs incurred as a result of operations in Somalia, Bosnia, Southwest Asia, and Haiti.[223] Congress also authorized another supplemental appropriation to the Emergency Response Fund to reimburse the DOD for costs incurred for emergency relief for Rwanda.[224] The conference committee stated, however, that this authorization shall not be used to support "nation-building" activities in Rwanda.[225]

20. Obligation of Funds Where Amount Appropriated Exceeded Amount Authorized.—With the exception of specifically enumerated programs, Congress authorized the DOD to obligate funds for all FY 1994 programs, projects, and activities for which the amount appropriated exceeded the amount authorized.[226]

21. Exceptions to Antideficiency Act (ADA) Limits Possibly Expanded.—The authority to accept voluntary services[227] may be expanded to include community-oriented services. But first, the DOD must conduct a pilot program and analyze the impact of these relatively sweeping changes to ADA strictures.[228] If implemented, the DOD may accept the following voluntary services: medical, dental, nursing, and other health-related services; family support, child development, and youth service programs; and religious, MWR, and other programs.[229]

22. North Atlantic Treaty Organization (NATO).—In another "Sense of Congress" section, Congress indicated that, while it is desirable that NATO work with other international organizations where feasible, NATO should be an independent organization.[230] Specifically, Congress pointed out that NATO should not be viewed as an "auxiliary" to the United Nations. In light of this autonomy, Congress reaffirmed its view that NATO members reserve the right to act collectively in defense of their vital interests, even if the United Nations should fail to act.[231]

23. DOD Authority to Enter into Acquisition and Cross-Servicing Agreements Expanded.—Congress amended the NATO Mutual Support Act (NMSA)[232] to expand DOD authority to acquire logistic support, supplies, and services.[233] The DOD now has the authority to enter into agreements with the United Nations and any international regional organization of which the United States is a member. The 1995 Authorization Act increases the monetary ceilings under the NMSA and provides a waiver of the ceilings in certain contingency opera-

---

[219] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 818, 108 Stat. 2663, 2821 (1994). On August 22, 1994, the Defense Contract Audit Agency (DCAA) and the Defense Contract Management Command (DCMC) issued guidance clarifying their January 1994 guidance. The new guidance states that, in determining overall savings, auditors should consider both direct and indirect restructuring costs. *See* Memorandum, DCMC/DCAA, to District Commanders (DCMC), Regional Directors (DCAA), subject: Clarification of Treatment of Direct Restructuring Costs (Aug. 22, 1994).

[220] H.R. CONF. REP. No. 701, 103d Cong., 2d Sess. 731 (1994).

[221] *See, e.g.*, FAR 31.205-52, Asset Valuations Resulting From Business Combinations.

[222] *See* DLA/DCAA Memorandum, *supra* note 218.

[223] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 1002, 108 Stat. 2663, 2833-34 (1994) (authorizing supplemental appropriations of the Emergency Supplemental Appropriations Act of 1994, Pub. L. No. 103-211, 108 Stat. 5 (1994)).

[224] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 1002, 108 Stat. 2663, 2833-34 (1994).

[225] H.R. CONF. REP. No. 701, 103d Cong., 2d Sess. 739 (1994).

[226] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 1006, 108 Stat. 2663, 2835-36 (1994).

[227] Unless otherwise permitted by statute, the acceptance of voluntary services by the agency may violate the Antideficiency Act. 31 U.S.C. § 1342.

[228] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 1061, 108 Stat. 2663, 2845-47 (1994).

[229] *Id.*

[230] *Id.* § 1302, 108 Stat. at 2889.

[231] *Id.*

[232] 10 U.S.C. §§ 2341-2350.

[233] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103–337, § 1317, 108 Stat. 2663, 2899–2900 (1994).

tions. Further, it modifies the rules governing the credit of receipts. The Secretary of Defense now may credit the account that incurred the obligation or an account currently available for the purposes for which the expenditure was made. The NMSA Logistics support now includes the temporary loan of general purpose vehicles and other equipment not on the munitions list.[234]

24. Foreign Disaster Relief Authority.—This provision establishes a statutory basis for the President to provide foreign disaster relief. The statute authorizes the President to provide transportation, supplies, services, and equipment in support of relief activities.[235] When acting pursuant to this provision, the President must advise Congress of the extent and duration of such action within forty-eight hours of commencement.[236]

B. Department of Defense Appropriations Act, 1995

1. Introduction.—On September 30, 1994, President Clinton signed the Department of Defense Appropriations Act for FY 1995 (1995 Appropriations Act).[237] The 1995 Appropriations Act appropriates $243.6 billion in new obligational authority, approximately $3.5 billion more than the FY 1994 Act. When adjusted for inflation, however, this amount represents the tenth consecutive decline in defense budget authority[238] and, with the exception of 1948, the lowest level of spending since before World War II.[239]

2. Depot Maintenance.—Congress expressed a continuing concern over the backlog of depot maintenance work and its impact on operational readiness. According to the House committee report, this backlog has doubled within the past two years and grown to $2 billion.[240] Consequently, Congress increased the funding for select maintenance programs and reinstituted public/private competition for depot maintenance workloads.[241]

3. Defense Business Operations Fund.—In October 1991, the DOD established the DBOF as a revolving fund that would allow the DOD to manage the performance of working capital funds and industrial, commercial, and support-type activities. Unfortunately, for each of the last three years, the DBOF has operated at a loss, particularly in its depot and supply maintenance businesses.[242] Against this backdrop, Congress provided the DBOF $945 million, instead of the $1.17 billion requested by the President. The reduction in DBOF funding is a result of an anticipated reduction in personnel costs and a congressionally-mandated reduction in capital purchases by the DBOF. Congress specifically appropriated an additional $30 million to sustain DBOF commissary operations at current levels.[243]

4. Compensation for Defense Industry Executives.—Despite DOD opposition, Congress limited defense industry personnel costs chargeable to agency contracts. Beginning April 16, 1995, such costs under new contracts will be limited to no more than $250,000 per year.[244] Both the DOD and the defense industry opposed the cap, contending that it would drive talented individuals from the defense industry to a business sector without such restrictions.[245]

5. Reduction and Consolidation of Auditing and Contract Administration Activities.—Noting the dramatic drop in defense procurement activity over the last ten years, Congress concluded that it was time to reduce the number of auditors and contract administration personnel assigned to the DCAA and the DCMC. In addition to this cutback, Congress directed the DCAA to reduce its audit backlog to one year by 1997.[246]

---

[234] *Id.*

[235] *Id.* § 1412, 108 Stat. at 2912-13.

[236] *Id.*

[237] Pub. L. No. 103-335, 108 Stat. 2599 (1994).

[238] For example, budget authority for defense procurement accounts, in constant dollars, has dropped from $132.7 billion in FY 1985 to approximately $43.3 billion for FY 1995—more than 67%. H.R. REP. No. 562, 103d Cong., 2d Sess. 9 (1994).

[239] *Id.* at 4.

[240] *Id.* at 15, 74.

[241] Department of Defense Appropriations Act, 1995, Pub. L. No. 103-335, § 8057, 108 Stat. 2599, 2631 (1994).

[242] H.R. REP. No. 562, 103d Cong., 2d Sess. 264 (1994).

[243] The conference report requires the DOD to transfer funds to the Defense Commissary Agency to ensure that it is not adversely affected by the DBOF funding cuts. H.R. CONF. REP. No. 747, 103d Cong., 2d Sess. 143 (1994).

[244] Department of Defense Appropriations Act, 1995, Pub. L. No. 103-335, § 8117, 108 Stat. 2599, 2649 (1994).

[245] *See DOD Joins Defense Industry in Urging Conferees on Defense Funding Bill to Delete Senate Provision That Would Cap Executive Compensation at $148K,* 62 Fed. Cont. Rep. (BNA) 257 (Sept. 19, 1994).

[246] H.R. CONF. REP. No. 747, 103d Cong., 2d Sess. 64-65 (1994).

6. Department of Defense Attendance at Nongovernment Conferences, Symposia, and Conventions Questioned.—Attendance of DOD personnel at various events sponsored by nongovernment organizations[247] came under greater scrutiny. Congress expressed concern over the manner in which limited training funds are being diverted away from junior military personnel to allow more senior members to attend events "of questionable content in terms of professional development."[248] Consequently, Congress directed a comprehensive review of the content and quality of such events.[249]

7. Bombers, Transport Aircraft, and the Industrial Base.—Congress earmarked $125 million to help sustain the bomber industrial base. The conference report for the 1995 Appropriations Act notes that safeguarding the ability to produce additional B-2 aircraft "for one more year" is "critically important to U.S. national security."[250] Addressing the C-17 aircraft program, Congress indicated its desire that the costs associated with the production of the plane's engines be reduced so that it would not have to seriously consider developing a second manufacturing source for the C-17 engine.[251]

8. National Guard Participation in Counter-Drug Activities Does Not Result in ADA Violation.—Congress clarified its intent regarding funding to the National Guard in support of counter-drug activities. Specifically, it stated that such funds may be used while Guard personnel are in a Title 32 status or a state active duty status. Congress further indicated that it was "convinced" that DOD operations under such conditions for the last six years did not constitute a violation of the ADA.[252]

9. A Case of Counting Your Chickens Before They Hatch? Procurement Funds Reduced Based on Anticipated Savings from the FASA.—Convinced that the recently enacted procurement reform legislation will produce extensive savings for DOD agencies, Congress reduced procurement funds by $304.9 million.[253]

10. Investment/Expense Threshold Increased.—For the second consecutive year, Congress authorized an increase in the investment/expense threshold.[254] Department of Defense agencies now may use O&M funds to procure equipment items costing up to $50,000. This provision is not mandatory, apparently allowing agencies the discretion to retain a lower threshold.[255] Finally, the language in the 1995 Appropriations Act is not codified and has no express applicability beyond FY 1995.

11. Real Property Maintenance.—Characterizing the increasing backlog of real property maintenance work as "alarming,"[256] Congress earmarked $500 million of the DOD's O&M appropriation to reduce the backlog.[257] The conference agreement underlying the 1995 Appropriations Act specifically directs the DOD to make reducing the backlog associated with the repair and maintenance of enlisted personnel barracks a "top priority."[258]

12. Humanitarian Assistance and Emergency Response Funds.—Congress again provided funding for humanitarian relief activities performed by the DOD for the people in Southwest Asia, in the amount of $65 million.[259] Last year, Congress appropriated $48 million for these efforts, but provided that $30 million was available only for Kurdish relief

---

[247] The conference agreement specifically highlighted "national military associations and professional and technical organizations." *Id.* at 46.

[248] *Id.*

[249] *Id.* at 46-47.

[250] *Id.* at 95.

[251] *Id.* at 96.

[252] *Id.* at 153.

[253] *Id.* at 170.

[254] Department of Defense Appropriations Act, 1995, Pub. L. No. 103-335, § 8076, 108 Stat. 2599, 2635 (1994). *See* Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8092, 107 Stat. 1418, 1461 (1993) (increasing threshold to $25,000). The investment/expense threshold determines whether DOD agencies must use procurement or Operations and Maintenance (O&M) funds to buy supplies and equipment.

[255] A change already has been made to the Army's pamphlet governing such expenditures, increasing the threshold to $50,000. *See* Message, Defense Finance Accounting Service, DFAS-IN-AM, subject: Change (03) to DA Pamphlet 37-100-95 (261348Z Oct 94).

[256] H.R. REP. No. 562, 103d Cong., 2d Sess. 78 (1994) (stating that the backlog is growing by two billion dollars each year).

[257] Department of Defense Appropriations Act, 1995, Pub. L. No. 103-335, § 8158, 108 Stat. 2599, 2659 (1994).

[258] H.R. CONF. REP. No. 747, 103d Cong., 2d Sess. 64 (1994).

[259] Department of Defense Appropriations Act, 1995, Pub. L. No. 103-335, tit. II, 108 Stat. 2599, 2606 (1994).

activities.[260] Congress retroactively removed that limitation, thus allowing broader use of the DOD's remaining FY 1994 humanitarian relief funds.[261]

Congress also appropriated $299.3 million to the Emergency Response Fund to reimburse the DOD for costs incurred in providing emergency relief in Rwanda and migrant processing in Cuba. Congress also directed that no funds in the 1995 Appropriations Act may be used for Operation Support Hope activities in and around Rwanda after October 7, 1994.[262]

13. Supplemental Appropriations for Deployment of Forces.—In another "Sense of the Congress" provision, Congress indicated that the President should seek supplemental appropriations for any "significant deployment" of forces in support of international humanitarian, peacekeeping, or peace-enforcement operations.[263]

C. Military Construction Authorization Act for FY 1995

1. Introduction.—On October 5, 1994, President Clinton signed the Military Construction Authorization Act for FY 1995 (1995 Construction Act).[264] The 1995 Construction Act authorizes budgetary authority for specified military construction projects, unspecified minor military construction projects, and the military family housing program.

2. Unspecified Minor Military Construction Funding.—In keeping with its goal to improve the overall quality of life within the military community, Congress increased the total dollars available to the DOD for performing unspecified minor construction projects.[265] The 1995 Construction Act breaks out unspecified minor military construction funding as follows: $12 million for the Army;[266] $7 million for the Navy;[267] $7 million for the Air Force;[268] and $22.348 million for defense agencies.[269]

3. Authorizations Expire After Three Years.—Following past practice, Congress provided the DOD authority to use FY 1995 military construction funds for only three years.[270] This limitation precludes DOD agencies from using these funds for their normal five-year appropriation life.[271] The 1995 Authorization Act also identifies exceptions to this three-year limitation,[272] and extends authorization for specific FY 1991 and 1992 projects that have exceeded their original three-year authorization periods.[273]

4. Restrictions on Use of Construction Funds for Guard and Reserve Projects.—The 1995 Construction Act limits the use of military construction funds for unauthorized Guard and Reserve projects. Under this provision, funds are allowed to be used for unauthorized projects only under limited circumstances, to include: unspecified minor construction; emergency and contingency construction; environmental response actions; and the repair or replacement of existing damaged facilities.[274]

---

[260] Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, 107 Stat. 1418, 1426 (1993) (these funds remain available for obligation through September 30, 1995).

[261] Department of Defense Appropriations Act, 1995, Pub. L. No. 103-335, tit. II, 108 Stat. 2599, 2643 (1994).

[262] *Id.* 108 Stat. at 2659.

[263] *Id.* § 8103(2), 108 Stat. at 2644.

[264] Pub. L. No. 103-337, 108 Stat. 3027 (1994).

[265] The 1995 Construction Act authorizes a total of $46.348 million for the DOD's minor military construction program. Last year's Construction Act authorized $46.002 million. *See* Military Construction Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, 107 Stat. 1856 (1993).

[266] Military Construction Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 2104(a)(3), 108 Stat. 3027, 3029 (1994).

[267] *Id.* § 2204(a)(3), 108 Stat. at 3033.

[268] *Id.* § 2304(a)(3), 108 Stat. at 3039.

[269] *Id.* § 2405(a)(5), 108 Stat. at 3042.

[270] *Id.* § 2701(a), 108 Stat. at 3046 (1994).

[271] *See, e.g.*, Military Construction Appropriations Act, 1995, Pub. L. No. 103-307, § 119, 108 Stat. 1665 (1994).

[272] Military Construction Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 2701(b), 108 Stat. 3027, 3046-47 (1994).

[273] *Id.* §§ 2702-2703, 108 Stat. at 3047-50.

[274] *Id.* § 2601, 108 Stat. at 3044-45.

5. Secretarial Approval Required for Repair Projects Exceeding Five Million Dollars.—The 1995 Construction Act establishes a five-million-dollar Secretary of Defense approval requirement on the repair of a single-purpose facility or one or more functional areas of a multipurpose facility.[275] Congress imposed this requirement in light of its concern that O&M funds were being expended on major repair projects without adequate oversight. Hence, this provision restricts the authority to fund certain maintenance, repair, and minor construction projects with O&M funds.[276]

6. Limited Partnerships for Navy Housing.—Congress has authorized the Navy to enter into limited partnerships with one or more private developers to encourage the construction of housing near Navy installations.[277] The 1995 Construction Act also establishes a Navy Housing Investment Board that will be responsible for the conduct of this partnership program. This program also allows the Navy to contribute five to thirty-five percent of the costs associated with housing development. The partnerships will provide Navy personnel affordable housing on a preferential basis.

D. Military Construction Appropriations Act, 1995

1. Introduction.—On August 23, 1994, President Clinton signed the Military Construction Appropriations Act, 1995 (1995 MCA Act).[278] The 1995 MCA Act provides budget authority for specified military construction projects, unspecified minor military construction projects, and the military family housing program.

2. *Reprogramming Thresholds.*—Congress "clarified" the reprogramming threshold, making the approval requirements for reprogramming actions the same for both the active and reserve forces.[279] This threshold—twenty-five percent of the funded project amount or two million dollars, whichever is less—applies to military construction and family housing projects of both components.[280] The 1995 MCA Act allows the DOD to exclude certain environmental remediation costs of family housing construction projects in packaging a request for reprogramming approval.[281]

3. Cost-Plus-Fixed-Fee (CPFF) Contracts and Environmental Cleanup Considerations.—The 1995 MCA Act again restricts the use of CPFF contracts for most MCA funded projects.[282] Nevertheless, Congress specifically invited the Secretary of Defense to exercise "appropriate waiver authority" to facilitate the cleanup of hazardous waste and completion of base closures.[283]

4. Exercise-Related Construction.—Congress has reiterated its concern regarding the use of construction funds in military exercises. The 1995 MCA Act requires the Secretary of Defense to inform the Appropriations and Armed Services Committees of the plans and scope of any proposed military exercises involving United States personnel, when the Secretary anticipates that expenditures for construction, either temporary or permanent, will exceed $100,000.[284]

5. Line Item Requirement for Urban Renewal, Military-Style.—Concerned that DOD installations are failing to demolish unneeded facilities that pose a safety or environmental hazard, or otherwise have high ownership costs, Congress has directed the services to develop a demolition line item when preparing the 1996 Military Construction budget submission.[285] Although O&M funds may be used for demolition of unused facilities, Congress wants to highlight this matter by requiring a specific line item for this activity.[286]

---

[275] *Id.* § 2801, 108 Stat. at 3050-51 (amending 10 U.S.C. § 2811).

[276] *Id.*

[277] *Id.* § 2803, 108 Stat. at 3051 (to be codified at 10 U.S.C. § 2837).

[278] Pub. L. No. 103-307, 108 Stat. 1659 (1994).

[279] "Reprogramming" is the use of funds in an appropriation account for purposes other than those contemplated when Congress enacted the appropriation. *See* DEP'T OF DEFENSE, FINANCIAL MGMT. REG. 7000.14-R, vol. 2A, ch. 1, para. 010107.B.46 (June 1993).

[280] H.R. CONF. REP. NO. 624, 103d Cong., 2d Sess. 5 (1994).

[281] *Id. See also* S. REP. NO. 312, 103d Cong., 2d Sess. 15-16 (1994).

[282] Military Construction Appropriations Act, 1995, Pub. L. No. 103-307, § 101, 108 Stat. 1659 (1994) (restriction applies to all MCA-funded contracts exceeding $25,000, performed in the United States, except Alaska); *see also* DFARS 236.271 (requiring approval of Assistant Secretary of Defense (Production and Logistics) for such contracts); *see infra* note 1094 and accompanying text.

[283] H.R. CONF. REP. NO. 624, 103d Cong., 2d Sess. 6 (1994).

[284] Military Construction Appropriations Act, 1995, Pub. L. No. 103-307, § 113, 108 Stat. 1664 (1994).

[285] H.R. CONF. REP. NO. 624, 103d Cong., 2d Sess. 6 (1994).

[286] *Id.*

6. Reporting Requirements for General and Flag Officer Quarters.—Since 1984, Congress has had a policy of limiting repair and maintenance projects of general and flag officer quarters to no more than $25,000 per unit per year.[287] Congress has required that the DOD notify it when these efforts will exceed the amount submitted in the budget justification by twenty-five percent or $5000, whichever is less. Additionally, Congress must be notified when maintenance and repair costs will exceed $25,000 for a unit not identified in a budget submission.[288]

7. Relocation of Activities.—The DOD may not use funds appropriated for minor construction to transfer or relocate any activity from one base or installation to another, without prior notification to the Appropriations Committees.[289]

IV. Contract Formation

A. Authority to Contract

1. Technical Representative Without Authority to Approve Cost Overruns.—In *HTC Industries v. Aspin*,[290] the United States Court of Appeals for the Federal Circuit (Federal Circuit) upheld an ASBCA decision[291] that a contracting officer's technical representative lacked authority to approve cost overruns under the Limitation of Costs clause.[292] The court held that both the clause and the technical representative's appointment letter clearly stated that the technical representative lacked authority to approve cost overruns; thus, the case was "a classic example of why contracts are put in writing."[293] The court also held that the concept of implied actual authority did not apply, because the contractor was on notice of the limits of the representative's authority. Finally, while reaffirming its prior holding[294] that a contractor could raise an estoppel claim in a contract case, the court concluded that the contractor's estoppel claim failed because the evidence showed that the contractor knew the true facts, preventing detrimental reliance.

2. No Contract or Modification Without Proper Authority.—The Forest Service contracted for construction of an office building foundation.[295] During performance, representatives for both the contractor and the contracting officer executed a memorandum that later formed the basis for the contractor's claim for removal of excess waste material. The contracting officer's representative had an appointment letter delegating "overall authority" for the project except for fifteen designated areas (including making change orders). The board rejected the contractor's claim, finding that the contracting officer's representative lacked authority. The board held that there was no: (1) evidence of actual involvement by the contracting officer in the agreement; (2) evidence that the contracting officer later ratified the agreement; or (3) implied-in-fact contract, because the government representative had no authority to contract.

3. Alleged Oral Promise of Contracting Officer Did Not Create Implied-In Fact Contract.—The incumbent contractor providing medical transcription services for the Department of Veterans Affairs (VA) alleged that the contracting officer orally promised that it would be awarded the successor contract.[296] On bid opening, however, the incumbent's bid was the fourth lowest. When the contracting officer awarded the successor contract to the third lowest bidder,[297] the incumbent protested, alleging that the contracting officer's oral comments created an implied-in-fact contract requiring the government to award the contract to the incumbent. The court rejected that argument, finding that a government representative must have actual authority to contract before an implied-in-fact contract is created. Thus, even if the contracting officer made the alleged promise, no contract existed because such a representation was beyond the authority of the contracting officer under the *FAR*.

---

[287] H.R. REP. No. 516, 103d Cong., 2d Sess. 11-12 (1994).

[288] *Id.*

[289] Military Construction Appropriations Act, 1995, Pub. L. No. 103-307, § 107, 108 Stat. 1663 (1994).

[290] No. 93-1304, 1994 U.S. App. LEXIS 4205 (Fed. Cir. Mar. 7, 1994), *cert. denied*, 115 S. Ct. 189 (1994) (nonprecedential opinion).

[291] HTC Indus., ASBCA No. 40562, 93-1 BCA ¶ 25,560, *aff'd on recon.*, 93-2 BCA ¶ 25,701.

[292] FAR 52.232-20.

[293] *HTC Indus.*, 1994 U.S. App. LEXIS 4205, at *4 (quoting *HTC Indus.*, 93-1 BCA ¶ 25,560, at 127,312).

[294] Burnside-Ott Aviation Training Ctr., Inc. v. United States, 985 F.2d 1574 (Fed. Cir. 1993).

[295] Spring St. Found., Inc., AGBCA No. 92-232-1, 94-2 BCA ¶ 26,737.

[296] Domaglia v. United States, 30 Fed. Cl. 149 (1994), *aff'd*, 1994 U.S. App. LEXIS 28066 (Fed. Cir. Oct. 4, 1994).

[297] The two lower bidders were disqualified for lack of responsibility and lack of responsiveness, respectively.

4. Twenty-Nine-Month Delay Did Not Constitute Laches.—In *Compania Petrolera Nacional*,[298] the Defense Fuel Supply Center (DFSC) had a fuel contract in Honduras. Under the contract, the DFSC was to receive credits against future invoices based on refunded Honduran fuel taxes received by the contractor. Prior to the end of the contract, the contractor submitted credit memoranda to the DFSC indicating refunds, but the DFSC did not apply the credits to the contract's final payment. Approximately twenty-nine months after making the last payment under the contract, the DFSC filed a claim for the credits that it had not previously used.[299] The contractor asserted defenses of final payment, laches, and estoppel, all of which the board rejected. The board held that the final payment rule[300] did not apply because the contract did not address the DFSC's failure to charge the credits against the contract's last payment. Additionally, the board held that laches and estoppel did not apply because the twenty-nine-month delay was not unreasonable.

5. Transferor Under Novation Agreement Liable for All Obligations of Transferred Contract.—The Air Force awarded a contract to repair aircraft parts. With the government's consent, the contractor executed a novation agreement that assigned its contract rights to a second contractor;[301] however, the novation agreement made the original contractor liable for payment of all liabilities "which the [T]ransferee may hereafter undertake" under the contract. When the transferee failed to refund overpayments under the contract, the contracting officer notified the transferor that the government intended to set off the obligation against amounts owed the transferor under another contract. The board upheld the setoff, finding that under the novation agreement, the transferor acted as a guarantor for payment of the transferee's liability under the novated contract. Additionally, the board found that part of the overpayment occurred prior to the novation agreement, which made the transferor directly liable to the government.

B. Types of Contracts

1. Contractor May Appeal Award Fee Determination.—In *Burnside-Ott Aviation Training Center*,[302] under a cost-plus-award-fee contract, the government calculated the award fee by converting numerical performance scores into an award fee amount. The government did not, however, include the conversion table in the contract. The contractor alleged that the government improperly converted its performance scores, and submitted a claim for the amount it believed that it was underpaid. The contract included a clause stating that the government's determination of award fee is not subject to the disputes clause.[303] Denying the government's motion for summary judgment, the board found that it had jurisdiction under the CDA to consider whether the contracting officer's award fee determination was arbitrary and capricious.[304] The board distinguished its limited "arbitrary and capricious" standard of review from a de novo review of the contracting officer's fee determination.[305]

2. Contractor Entitled to Equitable Relief Under an Illegal Cost-Plus-Percentage-Of-Cost (CPPC) Contract.—In *Alisa Corp.*,[306] the government agreed to pay the contractor its actual costs plus a fee equal to ten percent of its actual costs. The board found that this was an illegal CPPC contract and that the contractor was not entitled to the full amount indicated by the contract terms.[307] Nevertheless, the board found that the government benefited by the contractor's performance, and made award on a *quantum valebant* basis.[308] The board

---

[298] ASBCA No. 44583, 94-3 BCA ¶ 26,988.

[299] Because the contract had expired, no additional contractor invoices existed that the DFSC could apply the credits against.

[300] Under the final payment rule, neither party may assert a claim against the other after final payment has been made. *See* American W. Corp. v. United States, 730 F.2d 1486 (Fed. Cir. 1984).

[301] Mancro Aircraft Co., ASBCA No. 45514, 94-3 BCA ¶ 27,030.

[302] ASBCA No. 43184, 94-1 BCA ¶ 26,590.

[303] The contract included a clause implementing *FAR* 16.404-2(a), which states in relevant part that "[t]he amount of the award fee to be paid is determined by the Government's judgmental evaluation of the contractor's performance in terms of the criteria stated in the contract. This determination is made unilaterally by the Government and is not subject to the Disputes clause."

[304] 41 U.S.C. § 605(a).

[305] *See also* ICSD Corp., ASBCA No. 28028, 90-3 BCA ¶ 23,027, *aff'd*, 934 F.2d 313 (Fed. Cir. 1991) (holding that the ASBCA may review a Value Engineering Incentive award to determine whether it is arbitrary and capricious, notwithstanding a contract clause purporting to exclude the award determination from the coverage of the disputes clause).

[306] AGBCA No. 84-193-1, 94-2 BCA ¶ 26,952.

[307] 41 U.S.C. § 254(b) states that "[t]he cost-plus-a-percentage-of-cost system of contracting shall not be used."

[308] *Quantum valebant*, meaning "as much as they were worth," was the measure of recovery in an action of assumpsit for goods sold and delivered. BLACK'S LAW DICTIONARY, 1119 (5th ed. 1979).

awarded the contractor its cost of materials plus a fee of ten percent, and made a downward adjustment to account for a thirty-five percent rebate that the contractor received from its supplier.

3. Architect-Engineer (A-E) Contractor Not Entitled to Price Adjustment When Project Cost Increases.—An agency may not pay an A-E contractor for design services exceeding six percent of the cost of a construction project, as estimated by the agency at the time of award.[309] In *Hengel Assocs.*,[310] the VA awarded Hengel a firm-fixed-price contract that included a $14,660 line item for design services and a project estimate of $387,000. Subsequently, the VA awarded a construction contract, based on Hengel's design, for $403,999. Hengel thereafter requested a price adjustment from $14,660 to $24,239.94, an amount equal to six percent of the construction contract price.[311] The board rejected Hengel's claim, finding that the six percent A-E limitation is a fiscal limitation placed by Congress on executive agencies and does not confer any right on contractors to receive six percent of the actual costs of construction.

C. Competition

1. Modifications.—

a. Agency Interpretation Does Not Determine Whether Modification Is out of Scope.—The GSBCA held that a modification adding 3000 telephone lines to a telecommunications contract, increasing the price by twelve percent,[312] was within the scope of the contract and need not be competed.[313] The protester argued that the agency's preparing a sole-source J&A, obtaining a delegation of procurement authority (DPA), and obtaining a certificate of procurement integrity from the contractor,[314] showed that the agency believed the modification was out of scope. The board, however, held that the agency's actions were not dispositive. Applying the test employed by the Federal Circuit in *AT&T Communications v. Wiltel, Inc.*,[315] the board found that the scope of competition for the original contract was sufficiently broad to accommodate the modification.

b. Adding Air Force Requirements to Laundry Services Contract Not out of Scope.—In *National Linen Service*,[316] the GAO approved the modification of an Army contract for laundry services at Fort Jackson, South Carolina. The Air Force issued an IFB for laundry and dry cleaning services at Shaw Air Force Base, South Carolina. Following bid opening, the contracting officer determined that the Air Force could obtain the services at a much lower cost through the Army contract. The Air Force cancelled the IFB, and the Army modified the Fort Jackson contract to include services for Shaw Air Force Base. The GAO held that the modification was one "which potential offerors would reasonably have anticipated under the changes clause."[317] The GAO also held that the Air Force could obtain the required services at a lower price provided a compelling reason to cancel the IFB existed.[318]

c. Sole-Source Modification Upheld.—In *Hercules Aerospace Co.*,[319] the GAO denied a protest against the sole-source modification of a contract for additional quantities of rocket motors for the AGM-88 high-speed antiradiation missile.[320] Following the explosion of a motor produced by Hercules, the Navy was faced with a shortage of this critical item. Despite

[309] 41 U.S.C. § 254(b); FAR 15.903(d)(1)(ii).

[310] VABCA No. 3921, 94-3 BCA ¶ 27,080.

[311] In addition to misunderstanding the effect of the six percent limitation, the contractor improperly applied the six percent to the *actual* construction *price*, instead of the *estimated* construction *cost*, as required by 41 U.S.C. § 254(b) and *FAR* 15.903(d)(1)(ii). Hengel was satisfied with the initial design price of $14,660 (even though six percent of the project estimate of $387,000 is $23,220) because the contracting officer allegedly told Hengel that the estimated project cost was really $250,000. The board, however, found no evidence that the VA misled Hengel.

[312] The modification increased the $16,096,449 contract price by $1,909,801.

[313] Pacific Bell v. NASA, GSBCA No. 12814-P, 94-3 BCA ¶ 27,067.

[314] None of these actions would be required for a within-scope contract modification.

[315] 1 F.3d 1201 (Fed. Cir. 1993).

[316] B-257112, 73 Comp. Gen. ____, 94-2 CPD ¶ ____, 1994 U.S. Comp. Gen. LEXIS 714 (Aug. 31, 1994).

[317] *Id.* at 3.

[318] *Id.* at 6. The GAO stated that where the government "has evidence that an award under the cancelled solicitation would require the government to pay more for the required services than it would pay under the proper modification of an existing contract, cancellation is clearly in the public's interest and therefore proper."

[319] B-254677, Jan. 10, 1994, 94-1 CPD ¶ 7.

[320] These missiles are used to suppress and destroy enemy radar sites.

Hercules's assertion that the Navy had "overreacted" to the motor explosion, the GAO held that the Navy had adequately justified the urgency of the procurement and approved award of the modification to the remaining mobilization base supplier of the items.

2. Anticipated Higher Costs Do Not Provide Adequate Basis for Restricting Competition.—The United States Army Corps of Engineers (Corps) issued an IFB for remediation of petroleum contaminated soil.[321] The IFB restricted bidders to the "land farming" method of remediation.[322] The restriction prohibited the use of a technically acceptable alternative—the "thermal remediation" method.[323] The Corps based the restriction solely on its belief that thermal remediation would be too costly. The GAO sustained a protest alleging that the solicitation was unduly restrictive, holding that technical restrictions must be necessary to satisfy the agency's minimum needs while "cost considerations should generally be left to the marketplace."[324]

3. Authorized Release of Proprietary or Source Selection Information Does Not Justify Excluding Recipient from Competition.—Last year we reported the GAO decision in *KPMG Peat Marwick*,[325] finding that the agency had improperly excluded Peat Marwick from a reopened competition. This year, the GAO reaffirmed that decision on request for reconsideration.[326] A loser in the original competition, Peat Marwick submitted a Freedom of Information Act (FOIA) request to the agency. In response, the agency provided redacted copies of the technical proposals submitted by the two awardees[327] and detailed information regarding the evaluation of proposals. Following receipt of this information, Peat Marwick protested to the GAO.[328] In response, the agency agreed to reopen the competition and the GAO dismissed the protest. However, the contracting officer decided to exclude Peat Marwick from the reopened competition because Peat Marwick had obtained an unfair competitive advantage through the FOIA request. The GAO agreed that the information would give Peat Marwick a competitive advantage, but disagreed with the contracting officer's remedy. The GAO held that the agency should release the information in the FOIA response to all competitors. According to the GAO, the awardees had approved the release of the redacted proposals and, therefore, could not now complain of their further release. Likewise, the agency had implicitly approved the release of source selection information through the FOIA response.[329]

4. The GAO Upholds Requirement for Certification by Private Testing Laboratory.—Generally, an agency may not impose a requirement for approval by a designated testing laboratory, such as Underwriters Laboratory (UL), without recognizing equivalents.[330] However, in *G.H. Harlow Co.*,[331] the GAO denied a protest challenging a requirement that bidders offer only fire alarm systems approved by Factory Mutual Engineering and Research (Factory Mutual). The solicitation called for delivery of a fire alarm and computer-aided dispatch (CAD) system. The GAO held that, because of the threat to the safety of personnel, the agency was justified in seeking independent confirmation that the fire alarm and CAD systems would function together.

5. Geographic Restrictions.—

a. Single Job Site Requirement Upheld.—In *LIPS Propellers, Inc.*,[332] the GAO addressed a Coast Guard attempt to limit the place of performance to a single job site. The IFB called for overhaul and repair of propellers for Coast Guard icebreakers. LIPS, the incumbent contractor, protested the requirement for a single job site as unduly restrictive of competition.[333] The GAO denied the protest, accepting the Coast

---

[321] Falcon Indus., B-256419, June 3, 1994, 94-1 CPD ¶ 337.

[322] This method involves the use of microbes to remove the contaminants.

[323] This method involves the use of high-temperature treatments to destroy the contaminants.

[324] *Falcon Indus.*, 94-1 CPD ¶ 337, at 5.

[325] B-251902.3, Nov. 8, 1993, 93-2 CPD ¶ 272.

[326] Agency for Int'l Dev.; Dev. Alternatives, Inc.—Recon., B-251902.4, Mar. 17, 1994, 94-1 CPD ¶ 201.

[327] The agency had notified the awardees of the FOIA request and obtained redacted copies of the technical proposals from them.

[328] Protest grounds included failure to follow the request for proposal's (RFP) evaluation scheme and improper award on initial proposals.

[329] *Federal Acquisition Regulation* 3.104-5(d)(1) provides that the head of an agency, or the contracting officer, may authorize the release of source selection information.

[330] *See, e.g.*, Haz-Stor Co., B-251248, Mar. 18, 1993, 93-1 CPD ¶ 242.

[331] B-254839, Jan. 21, 1994, 94-1 CPD ¶ 29.

[332] B-256713, July 15, 1994, 94-2 CPD ¶ 26.

[333] Not surprisingly, LIPS could not meet the single job site requirement.

Guard's argument that the tight tolerances and transportation problems involved in the work necessitated the requirement.

b. Fifty-Mile Restriction Upheld.—In another Coast Guard case,[334] the GAO upheld a solicitation requirement that limited competition to firms located within a fifty-mile radius of the Coast Guard facility. The resulting contract, for haul-out repairs of utility boats, required frequent inspections by Coast Guard personnel at the contractor's facility. The Coast Guard convinced the GAO that the fifty-mile restriction was reasonable. The GAO found that any further distance would adversely impact the Coast Guard's ability to transport the boats to the contractor's facility and to conduct frequent quality assurance inspections.

c. Quick Turn-Around Time Does Not Necessarily Equate to a Geographic Restriction.—The *CardioMetrix*[335] decision demonstrates the importance of considering the impact of advanced technology on a contractor's ability to meet contract requirements. The Federal Bureau of Prisons (BOP) issued a solicitation for radiology interpretation services at a Miami prison. The solicitation set stringent time limits for provision of the services.[336] The BOP awarded the contract to a contractor located in Phoenix, Arizona. CardioMetrix protested the award, alleging that the tight time limits mandated the use of a local firm. The GAO disagreed, finding that the awardee's plan to use teleradiology equipment to transmit X-ray images to Arizona satisfied the contract requirements.

D. Negotiated Acquisitions

1. Solicitation Providing for Variable Evaluation Criterion Weight Passes Muster.—Although solicitations generally must provide offerors enough information to compete intelligently and on an equal basis, an RFP need not give precise details of the government's evaluation process. The GAO recently applied this rule in the context of a $3.5 billion managed health care procurement by the Office of the Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS), and found that a variable evaluation criterion weight permitted competition on an intelligent and equal basis. The GAO determined in the *QualMed, Inc.*,[337] protest that the OCHAMPUS made a reasonable disclosure of evaluation criteria weights in its RFP, despite an ambiguous disclosure of the weight that the government would accord an "equity at risk" evaluation criterion, because the government intended to vary the weight of that criterion based on its cost realism assessment of offerers' proposals. Thus, if an offeror proposed realistic health care costs, the OCHAMPUS would give the "equity at risk" criterion little role in its award decision, while an offeror's equity would be a more significant factor if the government had concerns about a proposal's cost realism.

2. Proposal Evaluations.—

a. Evaluation Methodologies Must Comport with Those Discernable from the RFP.—Both the GAO and the GSBCA will sustain protests of procurements in which agencies use evaluation criteria or weights materially different from those stated in the RFP.[338] Recently both forums have indicated a willingness to grant relief for evaluation methodologies that stray far from the RFP as well, if accurate disclosure of an agency's evaluation approach might have affected how offerors would propose in response to the solicitation.[339] In *Systems Resources, Inc. v. Department of the Navy*,[340] the GSBCA found prejudicial error in the Navy's failure to disclose that it would make value added adjustments to offerors' prices for extra features exceeding the required minimums. Although the RFP indicated that technical proposals would be evaluated only on an acceptable/unacceptable basis, the Navy applied a cost savings adjustment for added features. The GSBCA found the cost adjustment methodology used in the evaluation to be a significant evaluation factor that should have been disclosed, because offerors might have proposed differently if they had known these adjustments were possible. Simply making an "oblique reference to best value"[341] in the RFP was not enough to alert offerors that there would be what

---

[334] Marlen C. Robb & Son Boatyard & Marina, Inc., B-256316, June 6, 1994, 94-1 CPD ¶ 351.

[335] B-255748.2, June 13, 1994, 94-1 CPD ¶ 364.

[336] For example, the solicitation required interpretation of X-rays within eight hours.

[337] B-254397.13, July 20, 1994, 94-2 CPD ¶ 33. *See* Foundation Health Fed. Servs., Inc., B-254397.4, Dec. 20, 1993, 94-1 CPD ¶ 3 (previous protest involving the same procurement; *see infra* note 342 and accompanying text for discussion of this case).

[338] *See, e.g.*, J.A. Jones Mgmt. Servs., Inc., B-254941.2, Mar. 16, 1994, 94-1 CPD ¶ 244 (double-scoring or otherwise exaggerating the importance of any single criteria beyond the weight accorded it in the solicitation is improper).

[339] *See* Andersen Consulting v. United States, 959 F.2d 929 (Fed. Cir. 1992) (prejudice required before protest relief is appropriate).

[340] GSBCA No. 12536-P, 94-1 BCA ¶ 26,388.

[341] *Id.* at 131,283; *cf.* PCB Piezotronics, Inc., B-254046, Nov. 17, 1993, 93-2 CPD ¶ 286 (when evaluating proposals for an award that will clearly be made on a best value basis, giving higher scores to offerors that exceed minimum requirements is permissible, even if the RFP does not disclose how much extra credit the agency will give under each subfactor); C3, Inc., B-241983.2, Mar. 13, 1991, 91-1 CPD ¶ 279 (agency need not specify how much extra credit an offeror will receive for proposing desired rather than minimum requirements).

amounted to a cost/technical tradeoff, given other language in the RFP indicating that award would be made on a low-cost, technically acceptable basis.

The GAO considered a similar issue in a protest involving the award of an OCHAMPUS health management contract. In *Foundation Health Federal Services, Inc.*,[342] the OCHAMPUS evaluators based some of their conclusions on an evaluation approach different from that described in the RFP. One of the evaluation factors disclosed in the RFP addressed the feasibility of offerors' health care utilization management plans. Evaluators found the feasibility of the plans difficult to evaluate, and could not form opinions about whether these plans offered costs savings. Instead, the evaluators assessed potential health care managers based on a trend line analysis of past cost containment efforts. The GAO sustained the protest, finding that the use of this undisclosed methodology to evaluate offers was improper.

b. Technical and Cost Evaluations Must Be Reasonable, Not Mechanical.—In evaluating proposals to furnish nutrition services at an Army hospital, all individual evaluators rated a protester's management approach as "outstanding," but the offeror received a lower consensus rating of "very good." The protester complained in *Dragon Services, Inc.*,[343] that the evaluation was not reasonable, but the GAO disagreed and denied the protest. The GAO's overriding concern was that the final rating accurately reflect the merits of the proposal, not that the final rating be mechanically traceable to the scores of the individual evaluators. Because the final rating was determined after the evaluators discussed the proposal and determined that it lacked the significant advantages necessary to support a rating of "outstanding," the evaluators reasonably and properly rated it as "very good," notwithstanding the higher individual scores.

While the GAO found the use of an evaluation approach that was not mechanical to be reasonable in *Dragon Services*,[344] the GAO found in *DNL Properties, Inc.*,[345] that a mechanical approach for generating narrative support for evaluators' technical ratings was unreasonable. In that procurement, evaluators for the Department of Housing and Urban Development used the same preprinted, generic narrative for each proposal that they evaluated, and assigned a consensus point score on the top of each narrative sheet. Compounding the problem, the GAO found that the narrative sheets had been prepared in advance, before any evaluation was performed at all. Accordingly, the GAO found this proposal evaluation approach unreasonable, and held that the award decision was improper because it was not adequately supported.

Similarly, the mechanical application of a government estimate during an evaluation of a fixed-price proposal, resulting in a downgrade of its technical rating for deviation from the government's estimated number of hours to do the work, is unreasonable. Despite the general rule that an agency may consider proposed prices in assessing the risks associated with the performance of a fixed-price contract,[346] an agency must take into account a particularly skilled workforce or a unique approach when making such an assessment.[347]

c. Misrepresentation in Proposal Precludes Award.—An RFP for services generally should request resumes, hiring or employment agreements, and proposed responsibilities for key personnel. If a solicitation fails to request such information explicitly, offerors nevertheless often provide it in their proposals, because this information may play a role in an award decision. The awardee of an Army contract for maintenance and engineering services recently made overstatements of the commitments it had received from the previous contractor's personnel to work for it if it won the new contract.[348] The

---

[342] B-254397.4, Dec. 20, 1993, 94-1 CPD ¶ 3.

[343] B-255354, Feb. 25, 1994, 94-1 CPD ¶ 151. *See also* Appalachian Council, Inc., B-256179, May 20, 1994, 94-1 CPD ¶ 319 (use of consensus rating is not objectionable, and individual evaluators' ratings may differ from consensus evaluation).

[344] *Dragon Servs. Inc.*, 94-1CPD ¶ 151 at 10-11. Although supposedly only creatures of mythology, there have been regular dragon sightings around many courthouses and numerous federal agencies for decades. *See, e.g.*, Pennekamp v. Florida, 328 U.S. 331 (1946) (allegations of the press sowing dragons' teeth); Kipp v. LTV Aerospace & Defense, Inc., 838 F. Supp. 289 (N.D. Tex. 1993) (defendant's consultant identified plaintiff as a "dragon," meaning "a person who was a problem or trouble-maker and who should be limited in employment, if not removed"); Cholakian v. MTV Network, Inc., 725 F. Supp. 754 (S.D.N.Y. 1989) (dragon family living in Dragonia); Rackin v. University of Pa., 386 F. Supp. 992 (E.D. Pa. 1974) (agents of the Klan supposedly acting under orders of the Grand Dragon); EEOC v. Los Alomos Constructors, Inc., 382 F. Supp. 1373 (D.N.M. 1974) ("the Internal Revenue Service presently holds the track record as the most reluctant bureaucratic dragon . . . ."); Ellicott Mach. Corp. v. Wiley Mfg. Co., 297 F. Supp. 1044 (D. Md. 1969) (Dragon Line portable dredges); McDonnell Douglas Corp., ASBCA No. 22464, 78-2 BCA ¶ 13,269 (DRAGON missiles); Monroe M. Tapper & Assocs., POD BCA No. 349, 77-2 BCA ¶ 12,639 (Edward J. Dragon, a subcontractor's vice president of engineering); Compagnie Saigonnaise de Transit, ASBCA No. 13616, 70-2 BCA ¶ 8,496 (tariffs on *S.S. Fortune Dragon*); Cornell Univ., ASBCA No. 12171, 68-1 BCA ¶ 6,836 (Edward A. Dragon, Esq., attorney for the Agency for International Development); To the Secretary of the Navy, A-88151, 17 Comp. Gen. 293 (1937) (*U.S.S. Quincy* damaged oil hulk *Dragon*); Miller v. Michigan St. Apple Comm'n, 296 Mich. 248 (1940) ("last labor of Hercules was in slaying the sleepless dragon who guarded the golden apples of Hesperides").

[345] B-253614.2, Dec. 28, 1993, 93-2 CPD ¶ 301.

[346] *See, e.g.*, Forensic Medical Advisory Servs., Inc., B-248551.2, Oct. 28, 1992, 92-2 CPD ¶ 316.

[347] KCA Corp., B-255115, Feb. 9, 1994, 94-1 CPD ¶ 94.

[348] ManTech Advanced Sys. Int'l, Inc., B-255719.2, May 11, 1994, 94-1 CPD ¶ 326.

GAO found these overstatements to be material misrepresentations affecting the Army's evaluation of the proposal, notwithstanding that the RFP did not require specific personnel commitments. Therefore, the GAO recommended termination of the contract awarded to the offeror which included the misrepresentations in its proposal, and recompetition of the requirement.

d. New Twists on Cost Realism Evaluations.—Normally an agency evaluates proposals for cost-type contracts based on the probable cost of performance to the agency, not on offerors' proposed costs, because the contractor will receive payments based on its actual costs, rather than its estimated costs as described in its proposal.[349] However, if the contractor proposes to cap some of its costs, and to make actually incurred costs above those caps unallowable, then an agency not only may,[350] but it must, take those caps into account in developing the contractor's probable cost of performing work under the contract. In *BNF Technologies, Inc.*,[351] the GAO examined the Department of Energy's cost realism analysis in a competition for management services. The protester offered to cap its overhead and General and Administrative (G&A) rates at a fixed level, but the agency adjusted these rates to the protester's historical average in assessing its probable cost. The GAO determined this adjustment to be unreasonable, particularly in light of the DCAA's acceptance of the proposed rate caps, subject to an appropriate enforcement clause in its contract.[352]

Because public-private competitions between defense depots and commercial industry will continue for the foreseeable future,[353] agencies must strive to assess properly the comparative advantages and disadvantages of the competing entities. The *Sargent Controls & Aerospace*[354] protest demonstrates the importance of performing proper cost-realism assessments when comparing the proposed costs of a depot with the proposed costs of a private contractor. A contracting officer may not simply accept a DCAA certification that the public offeror's prices are adequate for evaluation. If the DCAA has not performed a probable cost analysis,[355] the procuring agency must perform one to determine whether the public offeror's proposed technical approach will work, and whether it has reasonably calculated its estimated costs for performing in accordance with that approach.

A recent Air Force procurement for global positioning systems demonstrated the difficulties inherent in performing most probable life cycle cost evaluations when multiple awards are possible under the solicitation. In *Litton Systems, Inc.*,[356] the GAO determined that the Air Force did not adequately justify its decision to award all of its requirements to a single competitor. The GAO found that misleading and inaccurate cost estimates and differing quantity assumptions resulted in a flawed understanding of price differences between competing award scenarios. This decision highlights the importance of performing a good lifecycle cost estimate for *each* possible award scenario, and of considering each possible award scenario carefully in a cost/technical tradeoff decision before making a contract award.

e. Past Performance Evaluations.—New *FAR* provisions implementing the OFPP's 1993 policy letter[357] on the use of past performance in the award of negotiated contracts expected to exceed $100,000 in value were published for comment early last year.[358] Although the new *FAR* provisions are not yet effective,[359] the OFPP remains committed to making past

[349] Probable cost is an offeror's proposed cost adjusted for cost realism. Sabre Sys., Inc., B-255311, Feb. 22, 1994, 94-1 CPD ¶ 129. Performing a cost-realism analysis involves examining whether the potential contractor has developed a reasonable approach to satisfying the agency's requirement, and determining whether it has proposed a realistic price for performing in accordance with its proposed technical approach.

[350] Halifax Technical Servs., Inc., B-246236.6, Jan. 24, 1994, 94-1 CPD ¶ 30 (holding that offeror may cap labor rates in proposal at amount it expects to bargain for with its union, and agree to be bound by those rates, even if it may later be unable to obtain such a rate agreement with the union; if an offeror so proposes, the agency may properly evaluate probable cost based on those rates). *See also* Halifax Technical Servs., Inc. v. United States, 848 F. Supp. 240 (D.D.C. 1994).

[351] B-254953.3, Mar. 14, 1994, 94-1 CPD ¶ 274.

[352] Any proposed rate caps must be enforceable for an agency to consider them in its cost realism assessment. *See* Vitro Corp., B-247734.3, Sept. 24, 1992, 92-2 CPD ¶ 202; *cf.* Versar, Inc., B-254464.3, Feb. 16, 1994, 94-1 CPD ¶ 230 (an agency's cost realism evaluation is improper if it favorably credits an awardee with a subcontractor's proposed uncompensated overtime, when the subcontractor was not bound to furnish it).

[353] *See supra* notes 191, 241 and accompanying text.

[354] B-254976, Feb. 2, 1994, 94-1 CPD ¶ 66.

[355] *See* Canadian Commercial Corp./Heroux, Inc., B-253278, 72 Comp. Gen. 312, 93-2 CPD ¶ 144 (1993).

[356] B-256709, July 21, 1994, 94-2 CPD ¶ 60.

[357] Office of Fed. Procurement Policy, Policy Letter 92-5, 58 Fed. Reg. 3573 (1993).

[358] 59 Fed. Reg. 8108 (1994). Included in the new provisions are amendments to *FAR* parts 9, 15, and 42, and a new *FAR* subpart 42.15, "Contractor Performance Information," which will require agencies to record and maintain contractor performance information.

[359] Like many other pending *FAR* changes, implementation of these provisions apparently has taken a back seat to the promulgation of other new *FAR* provisions to implement the new FASA.

performance a significant source selection factor in nearly all negotiated procurements,[360] and agencies are considering past performance regularly in their award decisions. Agencies cannot evaluate the past performance of a contractor that does not have any, and agencies should be careful to ensure that they do not stifle new competitors through overly vigorous enforcement of experience and past performance requirements.[361]

A recurring issue of concern as agencies conduct procurements using past performance as an evaluation factor is the extent to which a contracting officer must discuss with an offeror unfavorable past performance information that it receives from other sources. In *SDA, Inc.*,[362] the GAO determined that no need exists to permit an offeror to rebut adverse past performance reports received from sources named by the offeror in its proposal. Conversely, in *Daun-Ray Casuals, Inc.*,[363] the GAO found that the government's failure to allow a contractor to respond to unfavorable past performance information was improper, even when the offeror received an overall satisfactory rating, because the RFP explicitly stated that the contractor would be allowed to address unfavorable reports. When an agency discovers adverse information while evaluating an offeror's past performance, probably the best rule of thumb is to discuss the information if the RFP explicitly stated that the agency would do so, or if any possibility exists that discussions might affect the offeror's past performance rating. Perhaps the final *FAR* provisions addressing past performance evaluations will provide more guidance in this area, but in the meantime, agencies should decide whether to discuss adverse past performance information on a case-by-case basis in light of the evolving body of law in the area.

3. Competitive Range Determinations.—Exclusion of a technically acceptable proposal, or one that may be made acceptable, is proper if, in comparison with other offers, it stands no reasonable chance of receiving award.[364] However, an agency must not exclude an offeror from the competitive range for omissions that are easily correctable during discussions,[365] particularly if the agency continues to amend the RFP such that *no* competitor can provide a proposal truly meeting the agency's requirements until all amendments are issued. In *Integrated Systems Group, Inc. v. Department of Agriculture*,[366] the agency excluded the protester from the competitive range, precluding it from submitting a Best and Final Offer (BAFO) for mainframe computers, before the agency unambiguously defined its requirements and stopped amending the RFP. The GSBCA ruled that the agency could not properly obtain full and open competition if it excluded the protester from the competitive range without giving it an opportunity to be responsive to its *final* requirement.

4. Conducting Discussions.—During the past year, the GAO continued to closely scrutinize agency discussions with offerors on two grounds. The first ground involves discussion of *weaknesses* versus *deficiencies* in offerors proposals. In *Management HealthCare Products & Services*, the GAO succinctly stated its view on discussing weaknesses:

> Agencies are required to discuss weaknesses in an offeror's proposal where the weaknesses have a significant adverse impact on the proposal's technical rating, although discussions need not address every area in which the proposal received less than a perfect score, and the need for meaningful discussions may be constrained to avoid technical leveling, technical transfusion, and an auction.[367]

The conclusion evident from recent GAO decisions on this issue is that cumulative weaknesses may amount to a deficiency, thus necessitating meaningful discussions with the offeror.

---

[360] *See* 20 Agencies Sign Pledge to Participate in Pilot Program, 61 Fed. Cont. Rep. (BNA) 129 (Jan. 31, 1994) (twenty federal agencies signed pledge with the OFPP to make past performance a major consideration in large, ongoing procurements).

[361] *See* Espey Mfg. & Elecs. Corp., B-254738.3, Mar. 8, 1994, 94-1 CPD ¶ 180 (finding that an agency properly did not consider past performance of first-time offerors).

[362] B-256075, May 2, 1994, 94-2 CPD ¶ 71. *See also* Aid Maint. Co., B-255552, Mar. 9, 1994, 94-1 CPD ¶ 188 (holding that an agency may exclude offeror from competitive range for not meeting the RFP's minimum past experience requirement without giving it an opportunity to hire the needed talent).

[363] B-255217.3, July 6, 1994, 94-2 CPD ¶ 42. *See also* Ashland Sales & Serv., Inc., B-255159, 94-1 CPD ¶ 108 (requiring meaningful discussions regarding poor past performance reports, and finding a lack of support for the agency's marginal past performance rating).

[364] Radio Sys., Inc., B-255080, Jan. 10, 1994, 94-1 CPD ¶ 9 (offer was technically acceptable, but 350% higher on price).

[365] Essex Electro Eng'rs, Inc., B-250862, Feb. 23, 1993, 94-1 CPD ¶ 80 (finding that government improperly excluded offeror from competitive range for submitting unreasonably low prices, even though data omitted from proposal that would demonstrate reasonableness of proposed prices could be submitted during discussions).

[366] GSBCA No. 12552-P, 94-1 BCA ¶ 26,556.

[367] B-251503.2, Dec. 15, 1993, 93-2 CPD ¶ 320; *see also* Motorola, Inc., B-254489, Dec. 15, 1993, 93-2 CPD ¶ 322; Andrew M. Slovak, B-253275.2, Nov. 2, 1993, 93-2 CPD ¶ 263 (holding that discussions are not meaningful if an agency fails to discuss weaknesses significantly affecting the score, precluding a reasonable chance of award).

The second issue associated with agency discussions that received substantial GAO scrutiny during 1994 concerns misleading discussions. In *Ranar, Inc.*,[368] the Navy solicited for aircraft carrier catapult launch system cylinders, intending to award on a low-cost, technically acceptable basis. During several rounds of discussions, the contracting officer repeatedly told the protester (the low offeror based on initial proposals) that its price was well below the government estimate, which later proved to be erroneous, and was abandoned as a basis for evaluating the reasonableness of the awardee's offer. The GAO sustained the protest, finding these discussions prejudicially misleading, because they caused the protester to raise its prices twice, making it no longer the low-priced, acceptable offeror.[369]

5. Soliciting BAFOs.—

a. Reasonableness of BAFO Submission Periods.—The *FAR* requires agencies to provide offerors a reasonable time to submit BAFOs after the agency closes discussions.[370] In *FRC International, Inc.*,[371] the GAO considered a protest to a Defense Logistics Agency procurement that allowed possibly the shortest period ever reported, only two hours and fifteen minutes, for BAFO preparation and submission. Because the agency demonstrated that immediate responses were required, and because the protester was able to modify its initial offer and submit a BAFO within the time allowed, the GAO denied the protest. The decision demonstrates that the determination of what constitutes a reasonable BAFO submission period is dependent on the circumstances of the procurement, but agencies should use caution to avoid brief BAFO preparation periods that may limit the ability of offerors to respond appropriately within the time allowed, thereby compromising the competition obtained for their requirements.

b. Second BAFOs After an Unsolicited Price Reduction Are Not Auctions.—One of the risks that an agency runs in reopening discussions and calling for second BAFOs is that a protester will claim that the agency is engaging in an improper auction for the new contract.[372] However, when an unsolicited price reduction offered by one competitor in conjunction with an extension of its proposal acceptance period prompted the agency to call for second BAFOs from all offerors, the GSBCA determined that the agency's reopening did not amount to an improper auction.[373] Because the unsolicited price reduction clearly indicated a change in the marketplace, the contracting officer reasonably concluded that it was in the government's interest, and both necessary and unavoidable,[374] to seek second BAFOs. The GSBCA noted that there was no disclosure of any price information in conjunction with the reopening. The board's opinion indicates that there must be some disclosure of price or technical ranking information—if the contracting officer has otherwise acted reasonably in calling for a second BAFO—before the board will find an improper auction.

c. Reevaluation of BAFOs After Debriefing Discloses Evaluation Errors Does Not Require Reopening of Discussions and Second BAFOs.—Merely correcting an agency's evaluation of an offeror's BAFO, after the agency discovers during a debriefing that the agency misevaluated the proposal, does not require reopening of discussions with all offerors. In the *Aquidneck Systems International, Inc.*,[375] protest, the GAO considered an allegation that communications between the Internal Revenue Service (IRS) and an unsuccessful offeror in a data storage system competition—after the IRS discovered during the debriefing that it had made erroneous assumptions in evaluating the proposal—amounted to improper post-BAFO discussions. The protester had been the initial awardee, but the IRS terminated its contract after discovery of the evaluation error. The GAO determined that the protester was not entitled to make revisions to its BAFO in another effort to secure the contract, because the communications between the IRS and the other offeror merely were clarifications that resulted only in the correction of what proved to be an obvious error, but did not provide the ultimate winner of the competition an opportunity to amend its BAFO.

6. Source Selection Decisions—Who Decides What Constitutes "Best Value"?—The issue of how much deference (if any) the GSBCA gives to a source selection authority's cost/technical tradeoff decision in reviewing agency best

---

[368] B-255904, Apr. 14, 1994, 94-1 CPD ¶ 258.

[369] *See also* SRS Technologies, B-254425.2, Sept. 14, 1994, 94-2 CPD ¶ 125 (Navy improperly told offeror its prices were too low when all it needed was better support for offered prices); DTH Mgmt. Group, B-252879.2, Oct. 15, 1993, 93-2 CPD ¶ 227 (misleading to tell an offeror that its price is too low, based on comparison with a government estimate known to be faulty, thus causing offeror to raise its price beyond level that likely would have resulted in award).

[370] FAR 15.611(b)(3).

[371] B-255345, Feb. 18, 1994, 94-1 CPD ¶ 125.

[372] *See* Odetics, Inc., GSBCA No. 11506-P, 92-2 BCA ¶ 24,738 (although agency failed to discover and disclose deficiencies in proposal until evaluation of BAFOs, failure to discuss was not prejudicial error, so the agency had no justification for its second round of BAFOs; therefore, an illegal auction was found).

[373] Integrated Sys. Group v. Department of the Navy, GSBCA No. 12508-P, 94-2 BCA ¶ 26,623.

[374] *See* DFARS 215.611 (permitting use of additional BAFOs only when necessary and unavoidable); *see also* TRW, Inc., B-254045.2, Jan. 10, 1994, 94-1 CPD ¶ 18 (holding that source selection official must resolve significant inconsistencies between technical and cost proposals before making award decision; agency erred in not conducting additional discussions).

[375] B-257170.2, Sept. 30, 1994, 94-2 CPD ¶ 122.

value procurements was a contentious one in 1994 board protest decisions. In *B3H Corp. v. Department of the Air Force*,[376] the board's majority held that the source selection authority's cost/technical tradeoff decision was too conclusory, lacking a clear articulation of the rationale underlying the agency's best value determination. A strong dissent, however, accused the majority of substituting its judgment for the agency's, when the agency had met every applicable procurement law and regulation, and intelligently applied its experience in determining that the more technically competent contractor's offer merited payment of a higher price.[377] In response, the majority countered that the dissent would have the board use a "non-review" rather than a de novo review standard,[378] whenever a question regarding agency judgment in determining the best interests of the government arises in a protest. The GSBCA apparently is looking for a very high level of justification in reviewing the reasonableness of cost/technical tradeoff decisions, including, to the extent possible, the quantification of the technical and other noncost considerations that played a role in the source selection decision.

Interestingly, the application of the board's de novo review standard to agency source selection decisions sometimes works to the agency's advantage. In *Grumman Data Systems Corp. v. Widnall*,[379] the Federal Circuit upheld the GSBCA's examination of both the Air Force's cost/technical tradeoff analysis, and an independent analysis developed by the GSBCA itself,[380] to support the Air Force's award of a contract for an office automation system. Although the board found the agency's own source selection decision to be inadequate, it denied the protest.

In *Latecoere International, Inc. v. Garrett*,[381] the United States Court of Appeals for the Eleventh Circuit (Eleventh Circuit) ordered the reexamination of the award decision for a Navy contract won by an American firm that had scored lower technically in the competition, but offered a lower price. The Navy evaluation board had scored the protester's offeror significantly higher on several key technical criteria, which were weighted heavier than cost in the evaluation scheme. The Source Selection Advisory Council (SSAC), however, changed the awardee's rating for one factor from marginal to acceptable without a clear explanation or a complete reevaluation of the awardee's proposal, and minimized relative weaknesses in other evaluation areas. The court found this action to be irrational, arbitrary, prejudicial, and indicative of bias. Other evidence indicated that the award was based primarily on concern over awarding to an American firm rather than the foreign protester, a French firm otherwise apparently entitled to award under applicable procurement law and regulations. The source selection decision document did not support the Navy's determination that the protester's and the awardee's technical proposals were essentially equal, so price should not have played the decisive role that it did in the award decision. This decision highlights the importance of well-reasoned SSAC and source selection authority recommendations and decisions, particularly when they reject recommendations of competent technical officials who reasonably identify a clear winner of a competition, and most especially when any appearance of preferential treatment of offerors may result from the final award decision.[382]

7. Debriefings—Timing Is Critical in Protester's Effort to Obtain a Suspension of Agency's Delegation of Procurement Authority.—Although the timing of a debriefing after a contract award will change with the implementation of the FASA,[383] the *Information & Telecommunications Strategies, Joint Venture v. Department of the Navy*[384] protest demonstrates the need for swift action by a protester to obtain a sus-

---

[376] GSBCA No. 12813-P, 94-3 BCA ¶ 27,068.

[377] *Id.* (Devine, dissenting, noting that the selection decision in the protest at hand came down to a value judgment that the agency was much better qualified to make than the board).

[378] *See* 40 U.S.C. § 759(f)(1), which requires the GSBCA to use the same standard of review (de novo) when hearing protest cases as it uses when considering CDA appeals. *See* 41 U.S.C. § 609(b). The GAO's standard of review is more deferential to agency officials. *See, e.g.*, Red R. Serv. Corp., B-253671.2, Apr. 22, 1994, 94-1 CPD ¶ 385 (holding that when technical considerations are more important than cost, source selection officials have broad discretion in making cost/technical tradeoff decisions).

[379] 15 F.3d 1044 (Fed. Cir. 1994).

[380] *See* Grumman Data Sys. Corp. v. Department of the Air Force, GSBCA No. 11939-P, 94-2 BCA ¶ 26,822, *aff'd sub nom.* Grumman Data Systems Corp. v. Widnall, 15 F.3d 1044 (Fed. Cir. 1994).

[381] 19 F.3d 1342 (11th Cir. 1994).

[382] *See also* Colonial Storage Co., B-253501.5, Oct. 19, 1993, 93-2 CPD ¶ 234, *recon. denied*, 94-1 CPD ¶ 335 (when the RFP provides that award will be made on a best value basis, failure to document a well-reasoned determination that offerors are technically equal, and awarding based on low price, is a basis for overturning award, even if the agency claims it made such a determination).

[383] *See supra* note 13 and accompanying text.

[384] GSBCA No. 12605-P, 94-1 BCA ¶ 26,493.

pension of the agency's procurement authority from the GSBCA, pending a decision on the merits of the protest. The protester received almost immediate notice of the contract award, but failed to file a protest within ten calendar days after the date of award, and did not receive a debriefing for almost twenty days. Despite the Navy's concession that it did not have an urgent and compelling need to continue performance of the awarded contract, the GSBCA refused to grant the request to suspend the delegation of procurement authority pending a hearing on the merits.

E. Sealed Bidding

1. Bid Responsiveness.—

a. When Is an Amendment Material?—Agencies generally must reject bids if the bidder failed to acknowledge a material amendment to the Invitation for Bids (IFB).[385] In *Anacomp, Inc.*,[386] the IFB required the contractor to pick up government microfiche tapes every Monday, Wednesday, and Friday, but not on federal holidays. The low bidder failed to acknowledge an amendment that required pickup on the next business day if the federal holiday was on a Monday, Wednesday, or Friday. The GAO sustained the contracting officer's rejection of the bid, finding that the amendment was material "regardless of its effect on bid prices" because it imposed a new obligation on the contractor.[387] Conversely, the GAO found that the contracting officer improperly rejected a bid for failure to acknowledge an amendment in *L&R Rail Service*.[388] In this case, an IFB to supply tank and railway box cars required the contractor to sandblast the tank cars. The contracting officer amended the IFB to permit grit blasting of the exterior. The GAO determined that the amendment was not material because it imposed no additional obligation on the bidder but merely permitted an alternate and less costly method of performance.

b. Failure to Furnish Literature Is Fatal Despite Lack of Warning in IFB.—In *FloorPro, Inc.*,[389] the United States Mint (Mint) issued an IFB for the installation of epoxy to resurface the floor at the Philadelphia Mint. The IFB established eleven minimum requirements for the epoxy, and required bidders to submit technical information "sufficient to determine acceptability" of the offered supplies;[390] however, the IFB did not require a specific epoxy and did not expressly state that failure to provide descriptive literature would result in rejection of the bid.[391] The Mint awarded the contract to the low bidder (Astro), even though Astro's bid failed to demonstrate compliance with two minimum requirements. The GAO sustained the next low bidder's protest, finding that Astro's bid was nonresponsive. The GAO noted that an IFB provision requiring technical data generally relates to a bidder's responsibility when the IFB fails to disclose the purpose of the data, the extent to which it will affect the evaluation of bids, or the rules that will apply if the bidder fails to provide the literature. Nevertheless, the data requirement in this case related to Astro's responsiveness because bidders were sufficiently alerted to the agency's intention of using the data to determine conformance with the IFB.[392]

c. Agency Must Make Multiple Awards.—The Federal Aviation Administration (FAA) issued an IFB[393] for weather observation services at four sites in North Dakota.[394] Weather Experts, Inc. (Weather) submitted the low bid on one location only, but the FAA rejected its bid as nonresponsive.[395] The GAO held that multiple awards are required under an IFB when permitted by the invitation and when multiple awards would result in the lowest overall cost to the government.

---

[385] *See* FAR 14.405(d) (contracting officer may waive a bidder's failure to acknowledge receipt of an amendment only if the bid clearly indicates that the bidder received the amendment or that the amendment has merely a negligible effect on price, quantity, quality, or delivery).

[386] B-256788, July 27, 1994, 94-2 CPD ¶ 44.

[387] *See also* Jenness Woodkuts, a Joint Venture, B-257345, Sept. 22, 1994, 94-2 CPD ¶ 112 (amendment adding accountability and reporting requirements when government returns supplies under warranty clause is material); Eagle Constr. Servs., Inc., B-257841, Nov. 10, 1994, 94-2 CPD ¶ ____ (amendment clarifying that 14-foot dimension of a door is the "clear opening height for the door" is material).

[388] B-256341, June 10, 1994, 94-1 CPD ¶ 356.

[389] B-254854, Jan. 24, 1994, 94-1 CPD ¶ 32.

[390] *Id.* at 2.

[391] *See* FAR 14.202-5(d) (requiring IFB to clearly state the rules that will apply if a bidder fails to furnish required descriptive literature).

[392] *Compare* FloorPro, Inc., B-254854, Jan. 24, 1994, 94-1 CPD ¶ 32 *with* Krump/Walsh, A Joint Venture, B-256758, May 2, 1994, 94-1 CPD ¶ 287 (holding that bidder's failure to submit data with bid did not render bid nonresponsive because the IFB "failed to effectively require descriptive literature") *and* Acoustic Sys., B-248373, Aug. 24, 1992, 92-2 CPD ¶ 123 (holding that bidder's failure to submit certified test data with bid involved a matter of responsibility).

[393] Weather Experts, Inc., B-255103, Feb. 9, 1994, 94-1 CPD ¶ 93.

[394] Yes, people do live there.

[395] Unlike the FAA, we can appreciate Weather's reluctance to bid on more than one North Dakota location. Average temperature for winter months: 9.7 degrees Fahrenheit; average snowfall: 30 inches—Garden of Eden, Midwestern style. *See* 16 ENCYCLOPAEDIA BRITANNICA 618A (1973).

Because the IFB did not specifically prohibit multiple awards, the FAA improperly rejected Weather's bid.[396]

On the other hand, when an IFB provides that award will be made to the low aggregate bidder, a bid that fails to include a price for every item generally must be rejected as nonresponsive. In *The Jorgensen Forge Corp.*,[397] the Coast Guard issued an IFB for overhaul of two ship propeller hubs, requiring bidders to insert prices for all contract line items that would be added together to arrive at a total price. The Coast Guard rejected the protester's bid for inserting the notation "N/A" for most line items.[398] The GAO agreed with the Coast Guard's decision, holding that the bidder's use of the notation "N/A" created doubt as to whether the bidder intended to furnish the items in question.

d. Facsimile Modification Does Not Render Bid Nonresponsive.—In *American Eagle Industries*,[399] the Army Corps of Engineers issued an IFB that prohibited facsimile bids but authorized facsimile modifications or withdrawals.[400] MDP Construction, Inc. submitted a timely modification to its bid by facsimile, instructing the agency to replace the first two pages of its bid with the two new pages submitted by facsimile. The protester asserted that the modification rendered the bid nonresponsive because it replaced the original signature with a facsimile signature. The GAO wasted little time rejecting this argument, finding that the facsimile replacement did not void the bidder's intention to be bound.

2. Mistakes in Bids.—

a. Mutual Mistake Must Relate to Existing Facts.—In *Dairyland Power Cooperative v. United States*,[401] the contractor purchased a nuclear reactor plant from the Atomic Energy Commission, but later discovered that no commercial firms were available to reprocess the spent nuclear fuel. The contractor sought rescission of the contract based on a mutual mistake of fact, arguing that it conducted negotiations with the United States on the assumption that commercial reprocessing of nuclear fuel would continue. The Federal Circuit affirmed the Court of Federal Claims' granting of summary judgment for the government,[402] holding that the contractor failed to show that the parties had an erroneous belief as to an existing fact. The court reasoned that the availability of commercial reprocessing in the future could not constitute an existing fact at the time of the contract.

b. Erroneous Verification Request Does Not Entitle Contractor to Reformation.—A contracting officer must request that a bidder verify its bid, "calling attention to the suspected mistake," whenever he or she has reason to believe a mistake in the bid exists.[403] In *Solar Foam Insulation*,[404] the contracting officer asked the low bidder to verify its bid, but incorrectly advised the bidder that the difference between its bid and the next low bid was $32,669 rather than $113,669.[405] The bidder verified its bid, but after award it claimed that it would have corrected its bid had it known of the true price disparity. The board denied the bidder's appeal, finding that the bid verification request adequately advised the bidder of the purpose of the request and the basis for suspecting a mistake.

c. Positive Means Negative.—The General Services Administration (GSA) issued an IFB for landscape maintenance services which required bidders to submit bid prices in the form of a percentage factor (plus, net, or minus) of the government estimate.[406] Environmental Resources Group, Inc., (ERG) failed to specify whether its percentage factors were positive or negative, so the bid opening officer declared them positive. The contracting officer permitted ERG to correct its bid to reflect negative percentages of the estimate,

---

[396] The IFB contained *FAR* 52.214-10, which permits submission of bids for "quantities less than those specified" unless otherwise prohibited, and permits an agency to "accept any item or group of items of a bid." No other provision of the IFB precluded submission of bids on less than all four locations.

[397] B-255426, Feb. 28, 1994, 94-1 CPD ¶ 157.

[398] The IFB required bidders to submit composite labor rates on separate contract line items for various trades such as pipefitter, welder, or crane operator. The protester submitted only one labor rate, on a contract line item for an "inside machinist."

[399] B-256907, Aug. 8, 1994, 94-2 CPD ¶ 156.

[400] *See* FAR 14.202-7 (authorizing the contracting officer to permit facsimile bids); 14.303(a) (allowing bidders to submit facsimile modifications or withdrawals "if the solicitation authorizes facsimile bids").

[401] 16 F.3d 1197 (Fed. Cir. 1994).

[402] Dairyland Power Coop. v. United States, 27 Fed. Cl. 805 (1993), *aff'd*, 16 F.3d 1197 (Fed. Cir. 1994).

[403] FAR 14.406-1.

[404] ASBCA No. 46921, 94-2 BCA ¶ 26,901.

[405] The contracting officer correctly advised the low bidder that the difference between its bid and the government estimate was $137,127.

[406] Custom Envtl. Serv., Inc., B-255331.3, July 13, 1994, 94-2 CPD ¶ 20.

thereby displacing the low bidder.[407] The GAO sustained the contracting officer's decision, finding "on the basis of logic and experience" that the negative percentages were the only prices that made sense.[408]

3. Army May Consider Late Bid Returned to Bidder.—The Army issued an IFB for a heavy duty yard tractor with a bid opening date of July 19, 1993.[409] A bidder submitted its bid by registered German mail ten days before bid opening, but the bid was returned undelivered.[410] The bidder protested the Army's refusal to consider the bid. The GAO sustained the protest, finding that government mishandling was the proximate cause of the bid not being received prior to bid opening.[411] The GAO further held that consideration of the bid would not harm the integrity of the bidding process so long as the Army could establish by examination that the bid envelope had not been opened.[412]

4. Responsibility Determinations.—

a. A Rose by Any Other Name.—The contracting officer must make an affirmative determination of responsibility prior to award.[413] Recognizing that the contracting officer has broad discretion in making this subjective determination, the GAO generally refuses to review responsibility determinations absent a showing of fraud or bad faith.[414] The GAO stood firm in 1994, rejecting numerous attempts by bidders to characterize their attacks on the awardee as something other than an attack on the awardee's responsibility. Thus, the GAO dismissed protests alleging that the awardee failed to submit a license,[415] failed to state a place of performance,[416] changed its place of performance,[417] offered a noncompliant product,[418] and offered a product that violates FDA and United States Department of Agriculture (USDA) regulations.[419]

b. Bribery Lawsuit Does Not Mandate Nonresponsibility Determination.—The Army Corps of Engineers (Corps) found a bidder responsible even though the Corps had evidence that the bidder's foreign affiliate was being sued by the Brazilian government for bribery.[420] The protester asserted that the Corps ignored this evidence in bad faith.[421] The GAO rejected the protester's argument, finding that the Corps properly exercised its discretion in finding the bidder responsible and did not evince an intent to harm the protester. The GAO further noted that affiliation with an entity with questionable responsibility "does not per se establish a proper basis for a nonresponsibility determination."[422]

---

[407] *See* FAR 14.406-3(a) (prohibiting correction of a bid that displaces a lower bidder unless the existence of the mistake and the bid actually intended are ascertainable substantially from the IFB and the bid itself).

[408] In reaching its conclusion, the GAO considered the percentage factors in relation to ERG's option year prices, other bidders' prices, and the penal sum of the bid bond.

[409] PLAN-Industriefahrzeug GmbH & Co. KG, B-254517, 73 Comp. Gen. ___, 93-2 CPD ¶ 338 (1993).

[410] The bid was stamped by the German Post Office as follows: "Delivery not possible during normal business hours. Left notice-of-arrival slip. (12.07.93)" and "Not picked up. Holding period expired. Return. (20.07.93)."

[411] *See* FAR 14.304-1(a)(2) (providing that the government may consider a mailed, late bid when late receipt is due solely to mishandling by the government after receipt at the installation). The GAO determined that government mishandling occurred because the Army failed to send a mail clerk to the German Post Office within one working day of the notice-of-arrival slip, contrary to established procedures.

[412] The GAO recommended that the Army have "suitable experts" analyze the bid envelope to determine if tampering had occurred; if authentic and unopened, the Army should consider the bid. *PLAN-Industriefahrzeug*, 93-2 CPD ¶ 338, at 3.

[413] FAR 9.103(b).

[414] *See* 4 C.F.R. § 21.3(m)(5) (1994); Krump/Walsh, A Joint Venture, B-256758, May 2, 1994, 94-1 CPD ¶ 287.

[415] Integrated Protection Sys., Inc., B-254457.2, Jan. 19, 1994, 94-1 CPD ¶ 24.

[416] Nissho Iwai Am. Corp.; Patterson Pump Co., B-254870, Jan. 24, 1994, 94-1 CPD ¶ 34.

[417] Sunrise Int'l Group, Inc; Specialized Contract Servs., Inc., B-254875, Jan. 25, 1994, 94-1 CPD ¶ 39. *See also* VMS Hotel Partners v. United States, 30 Fed. Cl. 512 (1994).

[418] Deutsch Metal Components, B-255316, Feb. 17, 1994, 94-1 CPD ¶ 122.

[419] RetroTEC, Inc., B-255346, Feb. 22, 1994, 94-1 CPD ¶ 131.

[420] Tutor-Saliba Corp., Perini Corp., Buckley & Co., and O&G Indus., A Joint Venture, B-255756.2, Apr. 20, 1994, 94-1 CPD ¶ 268.

[421] *See* FAR 9.104-3(d) (requiring contracting officer to consider an affiliate's past performance and integrity "when they may adversely affect the prospective contractor's responsibility").

[422] *A Joint Venture*, 94-1 CPD ¶ 268, at n.2.

5. Cancellation of IFB.—

a. Overstatement of Minimum Needs Does Not Require Cancellation.—In *Delta Chemical Corp. v. West*,[423] the United States Court of Appeals for the Fourth Circuit (Fourth Circuit) upheld the Army's refusal to cancel an IFB which overstated the government's minimum needs. The appellant, Delta, argued on appeal that the contracting officer had no discretion and was required to cancel the IFB.[424] The court rejected this argument, holding that the *FAR* permits, but does not require, cancellation after bid opening when a compelling reason exists.[425] The court found the GAO decisions to the contrary "unpersuasive" and "of little value and undeserving of judicial deference."[426]

b. Cancellation of Solicitation Enjoined.—In *Parcel 49C Limited Partnership v. United States*,[427] the GSA cancelled a solicitation for a new Federal Communications Commission (FCC) headquarters building because of a change in the FCC's space requirements. The Federal Circuit upheld the trial court's injunction of the cancellation, finding that the change in the FCC's requirements was merely a pretext to accommodate the FCC's displeasure with the offeror selected by the GSA, Parcel 49C Limited Partnership (Parcel). The court rejected the government's argument that the injunction would effectively direct award of the contract to Parcel,[428] finding that the injunction merely "restores the posture of the process before the illegal cancellation."[429]

F. Small Purchases

1. Defense Federal Acquisition Regulation Supplement *Amended to Reflect New Contingency Operation Guidance.*—The Director of Defense Procurement has issued a final rule amending the *DFARS* guidance on small purchases during contingency operations.[430] The new guidance makes no substantive changes, but amends *DFARS* part 213 to incorporate the new statutory definition of "contingency operation"[431] for purposes of increasing the small purchase threshold.

2. Small Purchase Cases.—

a. Facsimile Transmission Record Does Not Prove Lost Quote.—An agency issued a Request for Quotations (RFQ) for shaft seal assemblies.[432] In response to the quotations received, the agency issued a purchase order to the apparent low quoter. The protester alleged that its quote was lost by the agency, and produced its facsimile machine transmission record as proof. The GAO held that the protester's records were not convincing evidence that the agency received the quote, and that an occasional loss of a quote was not sufficient to grant relief. In any event, the vendor could not resubmit its quote after closing time for receipt of RFQs, because no evidence existed that the resubmitted quote was the same as the original quote.

b. Inadvertence Does Not Excuse Failure to Comply with Small Business Set-Aside Requirement.—The Navy solicited quotes to repair an air conditioner compressor for a classroom at Jacksonville Naval Air Station, Florida.[433] The protester, a small business, advised the Navy on a Friday that it was interested in the award. That weekend, however, the compressor failed; the weekend maintenance staff then contacted five local firms without checking with the contracting office to determine whether the firms were small business-

---

[423] 33 F.3d 380 (4th Cir. 1994).

[424] The contracting officer had rejected Delta's bid as nonresponsive to the IFB. Delta protested that decision to the GAO, *see* Delta Chem. Corp., B-255543, Mar. 4, 1994, 94-1 CPD ¶ 175, but the GAO found Delta nonresponsive and denied the protest. The GAO also denied Delta's request to require the Army to cancel the IFB due to defective specifications, reasoning that Delta was not prejudiced by the defective specifications because its bid was otherwise nonresponsive.

[425] *See* FAR 14.404-1(a)(1) (requiring award to the lowest responsive, responsible bidder unless there is a compelling reason to cancel the IFB); 14.404-1(c)(2) (providing that agency head "may" cancel an IFB if he determines that specifications have been revised).

[426] The court specifically noted the Comptroller General decisions in Donco Indus., B-230159.2, June 2, 1988, 88-1 CPD ¶ 522 (stating that best interest of the government requires cancellation where the IFB overstates the government's minimum needs); International Trade Overseas, Inc., B-221824, Apr. 1, 1986, 86-1 CPD ¶ 310 (same); Diversified Energy Sys.; Essex Electro Eng'rs, Inc., B-245593.3, Mar. 19, 1992, 92-1 CPD ¶ 293 (same). *Cf.* Canadian Commercial Corp./Ballard Battery Sys. Corp., B-255642, Mar. 18, 1994, 94-1 CPD ¶ 202 (cancelling an "ostensibly deficient solicitation" is generally *inappropriate* when bidders would not be prejudiced by award and when such award would "serve the actual needs of the government").

[427] 31 F.3d 1147 (Fed. Cir. 1994).

[428] The government relied on language in Scanwell Lab., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970), that a disappointed bidder has no right to have the contract awarded to it in the event that the court finds the original award illegal.

[429] *Parcel 49C*, 31 F.3d at 1153.

[430] 59 Fed. Reg. 50,851 (effective Sept. 29, 1994).

[431] 10 U.S.C. § 101(a)(13).

[432] Advanced Seal Technology, Inc., B-254667, Dec. 30, 1993, 94-1 CPD ¶ 4.

[433] Southeastern Chiller Servs., Inc., B-254925, Jan. 28, 1994, 94-1 CPD ¶ 49.

es.[434] The protester asserted that the agency improperly issued the purchase order to Trane, a large business.[435] The GAO agreed, finding that the agency did not follow proper procedures for cancelling the set-aside.

c. Small Purchase Evaluation Only Requires Fairness.—In *Tony's Fine Foods*,[436] the Defense Commissary Agency (DECA) issued an RFQ for firms to enter into blanket purchase agreements (BPAs) to run in-house bakeries, delis, and pizza carts in various commissaries. The protester challenged its nonselection, alleging that the agency failed to evaluate the protester's quote properly, that the agency failed to evaluate cost realism, and that the agency's basis for evaluation was defective. The GAO denied the protest, finding that the DECA complied with the requirement to evaluate the quotes fairly in accordance with the solicitation. The GAO further held that in small purchase acquisitions, no requirement exists to evaluate cost realism unless the RFQ specifically calls for it. Finally, the GAO dismissed the challenge to the DECA's evaluation basis, because the receipt of quotes started the time period for protests, rendering the protest of the evaluation basis untimely.

Creative Investment Research,[437] another case challenging an agency's evaluation, involved training services for the Department of Commerce. The RFQ required offerors to: (1) develop a training curriculum; (2) include certain presenters; (3) run the seminars; and (4) conduct evaluations. The protester challenged the agency's finding that it was not qualified. The GAO held that in small purchase cases the CICA[438] does not apply, but agencies are required to treat offerors fairly and equitably. Examining the protester's proposal, the GAO held that the agency's decision to disqualify the protester was reasonable.

d. Contractor Must Deliver Conforming Goods to Accept Unilateral Purchase Order.—In *Master Research and Manufacturing, Inc.*,[439] the government issued a unilateral purchase order[440] for helicopter pistons. The purchase order called for a specific make and model part, but the contractor shipped a different part. The contracting officer then cancelled the purchase order, and the contractor claimed for the purchase order amount, arguing that its shipment constituted acceptance. The board disagreed, holding that, with a unilateral purchase order, a contract is formed only when the contractor provides *conforming* goods or services in response to the purchase order. Because the contractor did not provide conforming goods by the due date, the contracting officer could cancel the order.

G. Labor Standards Developments

1. No Legislative Reform.—The news regarding reform of the Davis-Bacon Act (DBA)[441] and Service Contract Act (SCA)[442] is that there is no news. Despite numerous bills introduced in both houses, Congress failed to enact major changes to either act.[443]

2. District of Columbia Circuit Continues to Limit Davis-Bacon Act Coverage.—Although Congress has not passed legislation amending the DBA, the District of Columbia Circuit has issued another decision limiting the scope of the DBA's coverage. In *Ball, Ball & Brossamer, Inc. v. Reich*,[444] the court held that contractor employees working at a borrow pit and batch plant located two miles from a construction site were not covered by the DBA. Citing its previous decision in *Building & Construction Trades Department v. United States Department of Labor Wage Appeals Board*,[445] the court held that DOL regulations extending DBA coverage to facilities

---

[434] Under the present version of *FAR* 13.105, all purchases less than $25,000 are reserved for small businesses unless certain exceptions apply. Under the FASA, this guidance still will apply to purchases between $2500 and the simplified acquisition threshold. *See supra* note 109 and accompanying text.

[435] Under the small business set-aside rule, large businesses are not eligible to submit quotes or receive awards of small purchases, unless the contracting officer decides to cancel the set-aside. *See* FAR 52.219-4, Notice of Small Business-Small Purchase Set-Aside.

[436] B-254959.2, Jan. 31, 1994, 94-1 CPD ¶ 51.

[437] B-255287, Feb. 7, 1994, 94-1 CPD ¶ 84.

[438] 10 U.S.C. § 2304; 41 U.S.C. § 253.

[439] ASBCA No. 46341, 94-2 BCA ¶ 26,747.

[440] Under a unilateral purchase order, the contractor accepts the order not by signing the purchase order, but by performance (*i.e.*, providing the supplies or services requested).

[441] 40 U.S.C. §§ 276a-276a-7.

[442] 41 U.S.C. §§ 351-358.

[443] The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994), made several minor changes to the DBA, including an exemption for volunteer labor on certain projects. *See id.* §§ 7303, 7304, 108 Stat. at 3382.

[444] 24 F.3d 1447 (D.C. Cir. 1994).

[445] 932 F.2d 985 (D.C. Cir. 1991) (commonly referred to as the "*Midway*" decision). The court in this case invalidated Department of Labor (DOL) regulations that defined construction to include the transportation of materials to and from the construction site. *See* 5 C.F.R. § 5.2(j)(2) (1994).

located off of the construction site[446] were inconsistent with the plain language of the DBA and, therefore, invalid.[447] These two decisions effectively limit DBA coverage to employees working at the physical site of a covered construction project.

3. Price Adjustments.—In *Professional Services Unified, Inc.*,[448] the contractor sought a price adjustment, including indirect costs and profits, associated with the postaward incorporation of a wage determination. The wage determination was based on a predecessor contractor's collective bargaining agreement (CBA).[449] The contracting officer had received timely notice of the new CBA but failed to inform the DOL of the change in rates.[450] The contractor's price adjustment claim applied to the base and first option years of the contract. The ASBCA held that, for the option year, the Fair Labor Standards Act/Service Contract Act (FLSA/SCA) Price Adjustment clause[451] limited the contractor's recovery to the direct price increase attributable to the new wage determination.[452] For the base year, however, the board applied a mutual mistake theory and held that the contractor was entitled to an equitable adjustment, including its indirect costs and a reasonable profit. The board did not distinguish a line of cases holding that a contractor is strictly liable for the costs of complying with the SCA when a wage determination is erroneously included, or omitted, from a contract.[453]

In *BellSouth Communications Systems, Inc.*,[454] the ASBCA found a contractor entitled to an equitable adjustment due to a determination that the DBA applied to its contract. The contracting officer, with DOL concurrence, initially had determined that the DBA did not apply to the contract. After the exercise of several contract options, however, the contracting officer determined that the DBA applied to a portion of the work called for at the option sites.[455] As a result, the contracting officer modified the contract to include the appropriate DBA clauses and wage determinations. The contractor filed a claim for the increased costs associated with the incorporation of the DBA.[456] The government argued that analogous SCA clauses[457] limit a contractor's recovery to direct cost increases under these circumstances and, alternatively, that the *Christian* Doctrine[458] required the contractor to pay DBA rates regardless of whether a wage determination was included in the contract. The board first determined that the SCA clauses were inapplicable because both DOL regulations and the *FAR* provide guidance on dealing with this situation.[459] The board then held that the *Christian* Doctrine did not apply because the DBA is not self-implementing, but requires a contracting

---

[446] *See* 9 C.F.R. § 5.2(l)(1)(1993) (providing that "site of the work" includes facilities such as batch plants and borrow pits when "they are dedicated exclusively, or nearly so, to performance of the contract or project, and are so located in proximity to the actual construction location that it would be reasonable to include them.").

[447] The court stated, "[t]he statutory phrase 'employed directly upon the site of the work' means 'employed directly on the site of the work.' Laborers and mechanics who fit that description are covered by the statute. Those who don't are not." *Ball*, 24 F.3d at 1453.

[448] ASBCA No. 45799, 94-1 BCA ¶ 26,580.

[449] 41 U.S.C. § 353(c) provides that a successor contractor, under certain circumstances, must pay wages and fringe benefits at least equal to those provided in a CBA between a predecessor contractor and its employees.

[450] *Federal Acquisition Regulation* 22.1012-5 sets out the procedures that the contracting officer should have followed under these circumstances.

[451] *See* FAR 52.222-43.

[452] That is, the difference between the labor rates set forth in the wage determination originally included in the contract and the rates set forth in the CBA.

[453] *See, e.g.*, Kleenco, Inc., ASBCA No. 44348, 93-2 BCA ¶ 25,619; Miller's Moving Co., ASBCA No. 43114, 92-1 BCA ¶ 24,707; Sterling Servs., Inc., ASBCA No. 40475, 91-2 BCA ¶ 23,714.

[454] ASBCA No. 45955, 94-3 BCA ¶ 27,231.

[455] The contract called for the upgrade of telephone facilities at two installations and contained options for similar work at four additional installations. The work at the additional installations, however, included the digging of trenches to lay cable. The contracting officer determined that this work was "construction" and, therefore, was covered by the DBA.

[456] The contractor's claimed costs included the difference between what it had been paying the employees performing this work and what it was required to pay under the DBA plus indirect costs and profit associated with these increased costs.

[457] *See* FAR 52.222-43; 52.222-44.

[458] *See* G.L. Christian & Assoc. v. United States, 312 F.2d 418 (Ct. Cl. 1963), *reh. denied*, 320 F.2d 345 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 954 (1964).

[459] Department of Labor regulations provide that, when an agency awards a contract to which the DBA applies without including a wage determination, "the agency shall either terminate and resolicit the contract with the valid wage determination, or incorporate the wage determination retroactive to the beginning of construction through supplemental agreement or through change order . . . ." 29 C.F.R. § 1.6(f) (1994). *Federal Acquisition Regulation* 22.404-9 provides that, under these circumstances, the contracting officer should either terminate the contract or "[m]odify the contract . . . and equitably adjust the contract price if appropriate."

officer or DOL determination that the Act applies to a given contract. The board distinguished a line of cases holding that the *Christian* Doctrine did apply when a DBA wage determination was not included in a contract.[460] The board noted that, in those cases, the DBA clearly applied at the time of award but that the agency had omitted the required clauses and wage determinations through "mere administrative oversight."[461]

4. Service Contract Act Blanket Wage Determinations.—The Army, with the approval of the DOL, has implemented a blanket wage determination program for SCA-covered contracts.[462] Under this program, contracting offices will develop comprehensive annual procurement plans including all eligible service contracts anticipated to be awarded during the upcoming year.[463] Based on these plans, the contracting office will submit an *SF-98* covering all anticipated types of services and labor classifications. The DOL will issue a blanket wage determination in response to the *SF-98*. Once the blanket wage determination is received, contracting officers no longer will have to submit *SF-98s* for each service contract, but simply will incorporate the applicable labor categories and rates into the solicitation and contract.[464]

H. Bonds and Sureties

1. Bid Guarantees.—

a. Nonconforming Bid Guarantee May Be a Minor Informality Rather Than an Inadequacy.—Generally, a bidder's failure to comply with a bid guarantee requirement renders its bid nonresponsive, and a contracting officer may safely eliminate a bidder from the competition on this basis.[465] In *Mid-South Metals, Inc.*,[466] however, the GAO sustained a protest from a bidder eliminated from the competition for submitting two credit cards as its bid guarantee, when the IFB required that bids guaranteed with a credit card must be guaranteed fully with a single card. The solicitation specifically stated that "multiple credit cards are not acceptable and will result in the bid being rejected as nonresponsive." Nevertheless, because the bidder legally committed itself for the full amount of the bid guarantee, the GAO found the submission of two cards to be a minor informality,[467] which the government was required to waive. The GAO did not permit the contracting officer to exercise discretion in determining whether to waive the discrepancy, as would have been the case with an inadequate bid guarantee.[468] The GAO noted that the bid guarantee itself *was* adequate, because the credit limit on either card would allow the government to charge the full bid guarantee amount; the bid guarantee lacked only the proper form required in the IFB, and the GAO apparently was reluctant to elevate form over substance.

b. Misrepresentation Makes Individual Surety Clearly Nonresponsible.—Normally, the adequacy of an individual surety offering an apparently adequate and binding security interest to secure a bid is a question of responsibility, not responsiveness.[469] Although responsiveness determinations are made from the bid documents alone, the contracting officer and the bidder normally exchange information when assessing a bidder's responsibility. However, in the *Harrison Realty Corp.*[470] protest, while investigating the assets pledged by individual sureties, the contracting officer discovered that the assets were not owned free of other interests, and, in some instances, may not have been owned by the sureties at all. The GAO found that the misrepresentations in the surety affidavits cast doubt on the integrity of the individual sureties, and upheld the contracting officer's rejection of the bid without further inquiry.

c. Just the Fax, Ma'am.—As more procurements involve photocopied documents or documents transmitted by facsimile rather than as original correspondence, the law surrounding

---

[460] *See, e.g.*, BUI Constr. Co. & Bldg. Supply, ASBCA No. 28707, 84-1 BCA ¶ 17,183; Miller's Moving Co., ASBCA No. 43114, 92-1 BCA ¶ 24,707.

[461] BellSouth Communication Sys. Inc., ASBCA No. 45955, 94-3 BCA ¶ 27,231 at 135,700.

[462] Memorandum, DA Labor Advisor, subject: Service Contract Act Blanket SF-98 Requests and Wage Determinations (2 June 1994).

[463] The following service contracts are not eligible for the program: those subject to § 4(c) of the SCA; those for which the locality where the contract services will be performed cannot be determined prior to award; those subject to *OMB Circular A-76*; or those resulting from consolidation or reconfiguration of existing contracts.

[464] This procedure is similar to that used for area wage determinations in DBA-covered contracts.

[465] *See, e.g.*, Concord Analysis, Inc., B-239730, Dec. 4, 1990, 90-2 CPD ¶ 452 (bid guarantee must be in the form required by the solicitation).

[466] B-257056, Aug. 23, 1994, 94-2 CPD ¶ 78.

[467] *See* FAR 14.405.

[468] *See* FAR 28.101-4; Apex Servs., Inc., B-255118, Feb. 9, 1994, 94-1 CPD ¶ 95 (contracting officers have discretion to waive or not waive inadequate bid guarantees, depending on the circumstances of the procurement and the needs of the government).

[469] Gene Quigley, Jr., B-241565, 70 Comp. Gen. 273, 91-1 CPD ¶ 182 (1991).

[470] B-254461.2, Dec. 30, 1993, 93-2 CPD ¶ 345.

bid guarantees is slowly adapting. Although the GAO has found faxed or photocopied bid bonds inadequate,[471] it recently determined that a bid bond containing an original signature, but accompanied by a photocopied power of attorney which by its own terms was valid in facsimile form, was sufficient to make the accompanying bid responsive.[472] Similarly, the GAO found a facsimile power of attorney adequate when it accompanied a bond submitted with an original signature.[473] Whether the GAO ever will find facsimile bonds themselves adequate remains to be seen, but the move toward electronic commerce eventually may make acceptance of bonds in other than original, hard copy form unavoidable.

2. *Performance Bonds.*—Two 1994 decisions of the United States Court of Federal Claims expanded the right of a performance bond surety to sue for funds held by the government under a right of subrogation. Interestingly, both decisions involved the same surety, Transamerica Insurance Co. In the first decision, the court found that funds withheld from the defaulting contractor as liquidated damages were subject to a subrogation claim by the surety, because the assertion of liquidated damages reduced retainages under the contract otherwise subject to the surety's claim.[474] In its second decision, the court interpreted its jurisdiction under the Tucker Act[475] as different from the jurisdiction of the boards of contract appeals under the CDA,[476] and held that a surety may pursue an equitable subrogation claim against the government without first submitting it to the contracting officer for a final decision.[477] The court also found that neither the execution nor performance of a contract takeover agreement transformed the surety's equitable subrogation rights into rights arising under, or related to, the contract, as contemplated under the CDA.

I. Small Business Program Developments

1. Regulatory Changes.—

a. Small Business Administration Increases Receipts-Based Size Standards.—The SBA increased its twenty-one receipts-based size standards by forty-eight percent.[478] This increase provides the first inflation adjustment in size standards since 1984. The SBA estimates that approximately 20,000 additional firms will be considered small under this change, thereby becoming eligible for SBA assistance and the small business set-aside program. However, the increase in size standards does not affect size standards established by statute.

b. Premature Size Protests.—Contracting officers and other interested parties may protest to the SBA the size status of a firm in connection with a procurement.[479] The SBA has amended its regulations to clarify that the SBA will dismiss size protests filed either before bids have been opened or, in negotiated procurements, before the identity of the prospective awardee has been established.[480]

c. 8(a) Program Changes.—The SBA has proposed changes to its Minority Small Business and Capital Ownership Development Program.[481] Among other things, the proposed changes would increase the entry-level net worth limitation from $250,000 to $300,000, increase the net worth limitation for program participants to $900,000, specify that competition thresholds for all types of contracts will be determined by reference to the government estimate, clarify that one or more socially and economically disadvantaged persons must have actual control of the firm at the time the application is complete, and recognize participation of Community Development Corporations in the 8(a) program.

---

[471] Regional Dev. Corp.—Recon., B-251299.2, Mar. 16, 1994, 93-1 CPD ¶ 238 (photocopied bid bond insufficient to bind surety); Bird Constr., B-240002, Sept. 19, 1990, 90-2 CPD ¶ 234 (facsimile bond lacks original signature, and is inadequate).

[472] Services Alliance Sys., Inc., B-255361, Feb. 22, 1994, 94-1 CPD ¶ 137.

[473] Ray Ward Constr. Co., B-256374, June 14, 1994, 94-1 CPD ¶ 367 (facsimile power of attorney showed intent to be bound by facsimile signature).

[474] Transamerica Ins. Co., 31 Fed. Cl. 532 (1994); *see also* Balboa Ins. Co., 775 F.2d 1158 (Fed. Cir. 1985) (on notice from surety of an anticipated default by the contractor, the contracting officer must act responsibly regarding remaining contract funds; the amount possibly subject to surety's subrogation claim is determined *at the time of the contractor's default*).

[475] 28 U.S.C. § 1491.

[476] 41 U.S.C. §§ 601-613; *see* Rodgers Constr., Inc., IBCA No. 2777, 92-1 BCA ¶ 24,503 (surety must submit claim to contracting officer for final decision as jurisdictional prerequisite to filing appeal with board); Peerless Ins. Co., ASBCA No. 28887, 88-2 BCA ¶ 20,730.

[477] *Transamerica Ins. Co.*, 31 Fed. Cl. at 602 (case of first impression).

[478] 59 Fed. Reg. 16,513 (1994) (effective Apr. 22, 1994, amending 13 C.F.R. pt. 121).

[479] 13 C.F.R. § 121.1601 (1994).

[480] 59 Fed. Reg. 19,426 (1994) (effective Aug. 3, 1994, amending 13 C.F.R. § 121.1603(a)(4)).

[481] *Id.* at 44,652 (1994).

d. Master Subcontracting Plans.—Based on industry recommendations, the Civilian Agency Acquisition (CAA) Council and the Defense Acquisition Regulations (DAR) Council have proposed a *FAR* amendment to permit three-year master subcontracting plans.[482] The proposed rule also would emphasize the contractor's responsibility to maintain and update the plan.

e. Source Selection Considerations.—In negotiated acquisitions over $500,000, the contracting officer generally must require the contractor to submit a subcontracting plan addressing planned subcontracting with small businesses and SDBs.[483] The DOD has amended its regulations to require that the extent of participation of small businesses and SDBs "be addressed in source selection."[484] For acquisitions based on other than only cost or price competition, the contracting officer must evaluate the extent to which offerors identify small businesses, SDBs, historically black colleges and universities, and minority institutions, and commit to having such entities perform the contract.

f. Feeling "SIC" No More.—The OMB has proposed to develop a North American Industry Classification System (NAICS) to replace the Standard Industrial Classification (SIC) system.[485] The NAICS would provide common industry definitions for the United States, Canada, and Mexico to facilitate economic analysis of the three economies. The new system would be based on a "production-oriented concept" where establishments are grouped "according to similarities in their production processes" rather than similarities in the products or services themselves.[486]

2. The GSBCA Lacks Jurisdiction over SIC Code Appeals.—The government awarded an 8(a)[487] contract to Tri-Cor Industries, Inc., (Tri-Cor) using a SIC code for "manufacture of electronic computers."[488] The protester asserted that the SIC code was improper because the contract specifications required only assembly, not manufacturing. The GSBCA dismissed the protest, holding that it lacked jurisdiction to hear SIC code appeals. The board reasoned that the assignment of SIC codes, and appeals of those assignments, are "exclusively within the province of the SBA."[489]

3. Set-Asides on Multiple Award Schedule Contracts.—In *Digital Systems Group, Inc.*,[490] the Coast Guard issued letters of interest (LOI) for computer software and support services to be ordered under the Financial Management Software Systems (FMSS) mandatory Multiple Award Schedule (schedule).[491] Digital, a small business, protested the Coast Guard's failure to set aside the LOI for exclusive small business participation.[492] The GAO denied the protest, holding that agencies ordering from the FMSS schedule, like agencies ordering from the Federal Supply Schedule (FSS),[493] need not consider set-asides before ordering. The GAO reasoned that the appropriate time for considering whether a small business set-aside is warranted is at the time of the schedule contract formation.[494]

---

[482] *Id.* at 46,385. Master subcontracting plans currently are effective for one year. *See* FAR 19.704(b).

[483] *See* FAR 19.708(b); 52.219-9.

[484] 59 Fed. Reg. 27,669 (1994) (effective May 27, 1994, amending *DFARS* 215.605).

[485] *Id.* at 38,092. Federal agencies use the SIC system to collect and publish statistical data describing establishments by industry.

[486] *Id.* at 38,094.

[487] *See* 15 U.S.C. § 637(a).

[488] JC Computer Servs., Inc. v. Nuclear Reg. Comm'n & United States Small Bus. Admin., GSBCA No. 12731-P, 94-2 BCA ¶ 26,712.

[489] *Id.* at 132,875. *See* 15 U.S.C. § 634(b)(6) (providing that the SBA may promulgate rules and regulations necessary to carry out the authority granted in the Small Business Act); 13 C.F.R. § 121.1703(b) (1994) (providing that any interested person adversely affected by a SIC code designation may appeal to the SBA, but limiting SIC code appeals on 8(a) contracts to the Minority Small Business and Capital Ownership Development office). *See also* Tri-Way Security & Escort Serv., Inc.—Request for Recon., B-238115.2, Apr. 10, 1990, 90-1 CPD ¶ 380 (holding that the GAO is precluded from considering SIC code appeals because of the SBA's exclusive authority).

[490] B-256422, June 3, 1994, 94-1 CPD ¶ 344.

[491] Agencies requiring financial management software must announce their requirements in an LOI to all contractors participating in the FMSS schedule program. GEN. SERVS. ADMIN., FED. INFO. RESOURCES MGMT. REG. 201-39.804-4(a) (Apr. 29, 1991) [hereinafter FIRMR].

[492] *See* FAR 19.502-2 (requiring agencies to set aside acquisitions for exclusive small business participation if the contracting officer reasonably expects to receive offers from two or more responsible small business concerns and make award at fair market price); 38.203(b) (providing that small business set-aside programs apply to schedule contracting).

[493] *See id.* subpt. 8.4.

[494] Prior to issuing the current FMSS schedule, the GSA specifically considered whether to set aside the schedule for small businesses, but concluded, with the SBA's concurrence, that it was not feasible.

4. Contracting Officer Must Reasonably Investigate Prior to Requesting Waiver of Nonmanufacturer Rule.—For contracts set aside for small businesses, the Nonmanufacturer Rule requires nonmanufacturer contractors to provide end items manufactured or processed by a domestic small business.[495] The SBA may grant a waiver of the Nonmanufacturer Rule if the contracting officer determines that no small business manufacturer can reasonably be expected to offer a product meeting the requirement.[496] In *Adrian Supply Co.*,[497] the FAA requested that the SBA waive the Rule after failing to locate any small business manufacturers for certain transfer switches. After obtaining a waiver from the SBA, the contracting officer issued an IFB for a total small business set-aside that permitted small business nonmanufacturers to furnish the switches from other than small business concerns.[498] Adrian protested, claiming that the contracting officer unreasonably determined that no small business manufacturers existed for the switches. Sustaining the protest, the GAO found that the contracting officer inadequately investigated the availability of small business manufacturers capable of making the switches,[499] and recommended that the FAA request the SBA to reconsider its waiver of the Nonmanufacturer Rule.

5. Small Business Responsibility Determinations.—

a. Referral to the SBA May Be Required in Negotiated Procurements.—Agencies must refer nonresponsibility determinations of small businesses to the SBA for review under certificate of competency (COC) procedures.[500] Frequently, however, agencies make nonresponsibility determinations in the guise of technical evaluations, but fail to refer the determination to the SBA. In *Envirosol, Inc.*,[501] the Defense Logistics Agency (DLA) issued an RFP for disposal of hazardous property which provided that the DLA would evaluate all technically acceptable proposals to determine the best value to the government, considering only price and past performance. After evaluating the BAFOs, the contracting officer rated Envirosol's price as "unreasonably low" and its past performance as "marginal." When the DLA selected another offeror for award, Envirosol protested, claiming that the DLA was required to refer the matter to the SBA for a possible COC because it is a small business. The GAO agreed, finding that a determination that an offeror's price is too low concerns the offeror's responsibility, requiring referral to the SBA.[502] The GAO did note, however, that agencies may assess price reasonableness to evaluate an offeror's understanding of the requirement, "so long as the RFP provides for evaluation of offeror understanding as part of the technical evaluation."[503]

In a similar case,[504] the USDA issued an RFP for operation of a mailroom that provided that all offerors found to be technically acceptable would be asked to submit price proposals. Although Docusort, Inc., was a small business, the USDA rejected its proposal as technically unacceptable because its assistant project manager lacked the required management experience. The GAO sustained Docusort's protest, finding that "lack of experience" is a responsibility factor, thus requiring SBA review. The GAO noted that agencies could use "management experience" and similar factors as technical evaluation factors when the RFP contemplates a comparative evaluation of those factors; however, merely evaluating such factors on a "pass/fail" basis is tantamount to a responsibility determination.

b. Getting Around the COC.—The Navy issued an RFP for repair of the *USS Guam* which listed fifty separate work items.[505] Although a small business submitted the lowest

---

[495] *See* 15 U.S.C. § 637(a)(17) (as implemented by 13 C.F.R. § 121.906 (1994)).

[496] *Id.* § 637(a)(17)(B)(iv). *See also* FAR 19.102(f)(6). Last year, the SBA issued a proposed rule to implement procedures for waiving the Nonmanufacturer Rule on individual solicitations. *See* 58 Fed. Reg. 48,981 (1993).

[497] B-257261, Sept. 15, 1994, 73 Comp. Gen. ____, 94-2 CPD ¶ ___.

[498] The IFB included the clause at *FAR* 52.219-6, "Notice of Total Small Business Set-Aside," Alternate I, which provides that a regular dealer submitting an offer agrees to furnish only end items manufactured or produced in the United States.

[499] The contracting officer searched the *Thomas Register*, a source that identifies suppliers of products and services, and provides corporate profiles. Although the *Thomas Register* listed more than 50 firms under the category "Switches: Transfer," the contracting officer apparently made little effort to determine whether the firms were small business manufacturers for the required switches.

[500] 15 U.S.C. § 637(b)(7); FAR 19.602-1; Peterson Accounting—CPA Practice, B-257411, Sept. 21, 1994, 94-2 CPD ¶ 109. The SBA has conclusive authority to determine all elements of small business responsibility, including capability, competency, capacity, credit, integrity, perseverance, and tenacity.

[501] B-254223, Dec. 2, 1993, 93-2 CPD ¶ 295.

[502] The GAO found that a determination that an offeror's price is too low concerns the offeror's ability and capacity to successfully perform the contract at its offered price.

[503] *Envirosol, Inc.*, 93-2 CPD ¶ 295, at 5. The RFP did not address the offerors' understanding of the requirements or provide for a relative ranking of technical merit.

[504] Docusort, Inc., B-254852, Jan. 25, 1994, 94-1 CPD ¶ 38.

[505] Holmes Bros. Enters., B-255271, Feb. 23, 1994, 94-1 CPD ¶ 138.

priced, technically acceptable offer, a preaward survey team found it nonresponsible and recommended award to another contractor. After determining that work on thirteen critical items could not be delayed pending a COC determination, the contracting officer deleted these items and allowed offerors to submit BAFOs on the revised RFP.[506] The GAO found the contracting officer's actions proper and not a ruse to circumvent the COC process.

c. May SBA Deny a COC for Reasons Other Than Those Named in Nonresponsibility Determination?—Yes, according to the Court of Federal Claims in *C&G Excavating, Inc. v. United States*.[507] In this case, the contracting officer found a small business nonresponsible due to a lack of capacity to perform the work, and forwarded the case to the SBA for review.[508] The SBA determined that the business had the capacity to perform the work, but refused to grant a COC due to the firm's precarious financial condition. While noting inconsistencies in the *FAR* and the *Code of Federal Regulations*,[509] the court, nevertheless, determined that the SBA properly could evaluate all aspects of a firm's responsibility, including factors that were not stated in the contracting officer's nonresponsibility determination.[510]

6. Small Disadvantaged Business and Section 8(a) Cases.—

a. The SBA, Not the DOD, Must Determine SDB Status.—In *Y.S.K. Construction Co. v. United States*,[511] a protester asserted that the low bidder, a joint venture, was not an SDB and, therefore, ineligible for award on an SDB set-aside contract.[512] The contracting officer determined the low bidder to be qualified as an SDB after the SBA refused to determine its status.[513] The court held, however, that the SBA, rather than the DOD, had the power "wholly and exclusively" to determine whether the joint venture was an SDB, and the SBA should not have even "requested guidance from DOD on this issue."[514] Because the DOD acted beyond the scope of its authority, the court remanded the case to the SBA for a determination of the low bidder's SDB status.

b. Supreme Court Agrees to Hear Minority Set-Aside Case.—In *Adarand Constructors, Inc. v. Pena*,[515] the United States Court of Appeals for the Tenth Circuit (Tenth Circuit) denied the appeal of a firm challenging the Department of Transportation's subcontracting compensation clause (SCC) program. The appellant asserted that the SCC program—which provides incentive payments to prime contractors for subcontracting with disadvantaged businesses—violates the equal protection guarantees of the Fifth and Fourteenth Amendments.[516] Applying an "intermediate scrutiny,"[517] the court found the SCC program constitutional because it was

[506] The work on the 13 items required immediate startup because of the ship's operational schedule. The contracting officer directed Navy personnel to perform the work.

[507] 32 Fed. Cl. 231 (1994).

[508] The Army Corps of Engineers had issued the small business set-aside contract for the dredging of the Rudee Inlet in Virginia Beach, Virginia. The contracting officer determined that the low bidder was nonresponsible because its dredge did not satisfy contract technical requirements.

[509] The court noted the "direct conflict" between *FAR* 19.602-2(a)(2) (providing that the SBA will investigate a firm "only for the specific elements of responsibility that the agency notice specified as lacking") and 13 C.F.R. § 125.5(d), (e) (providing that the SBA may "investigate and certify as to the bidder's responsibility" and "review the responsibility of the applicant").

[510] *Accord* Astrodyne, Inc.—Request for Recon., B-231509.2, July 7, 1988, 88-2 CPD ¶ 24.

[511] 30 Fed. Cl. 449 (1994).

[512] *See* 10 U.S.C. § 2323 (establishing five percent goal for DOD contracts with SDBs and minority institutions, and authorizing SDB set-asides); DFARS 219.502-2-70 (requiring DOD generally to set aside acquisitions for SDBs when there is a reasonable expectation that offers will be received from at least two SDBs and award will be made at not more than ten percent above fair market price).

[513] The SBA claimed that it did not have the authority to determine SDB eligibility of joint ventures, and asserted that the DOD was required to make this determination because it "requires a statutory interpretation by the agency that administers the statute." *Y.S.K. Construction Co.*, 30 Fed. Cl. at 454.

[514] *Id.* at 456.

[515] 16 F.3d 1537 (10th Cir. 1994).

[516] U.S. CONST. amends. V, XIV.

[517] The court relied on Fullilove v. Klutznick, 448 U.S. 448 (1980), wherein the Supreme Court upheld the constitutionality of a minority business enterprise set-aside program. The majority in *Fullilove* agreed that courts should not apply strict scrutiny when evaluating race-conscious remedial programs authorized by Congress, because Congress has broad powers under section five of the Fourteenth Amendment to remedy nationwide discrimination.

narrowly tailored to achieve a significant government interest— providing subcontracting opportunities to disadvantaged businesses.[518] The United States Supreme Court has granted appellant's petition for a writ of certiorari.[519]

c. The SBA Must Consider All Relevant Factors Adversely Impacting Small Businesses.—In *McNeil Technologies, Inc.*,[520] the Department of Health and Human Services (HHS) offered the SBA a management support services contract under the 8(a) program.[521] The SBA accepted the contract after concluding that there would be no adverse impact on McNeil, the incumbent contractor,[522] because McNeil had not been performing the contract for at least twenty-four months when the SBA accepted the requirement.[523] Sustaining McNeil's protest, the GAO found that the SBA improperly limited the scope of its adverse impact inquiry. The GAO held that the SBA must consider all relevant factors when determining whether adverse impact exists, rather than just those factors which would create a presumption of adverse impact.[524]

J. Domestic Preference

1. Congress, Agencies Implement North American Free Trade Agreement (NAFTA).—Late last year, Congress passed the NAFTA Implementation Act.[525] The DOD, GSA, and NASA subsequently amended the *FAR* to implement the changes required by the NAFTA Implementation Act.[526] Generally, the new rules eliminate "buy national" restrictions on nondefense related procurements from Canadian and Mexican firms. Under the new rules, designated agencies must evaluate offers of Canadian end products under supply contracts with an estimated value above $25,000, offers of Mexican end products under supply contracts valued at $50,000 or more, and offers of Canadian or Mexican construction materials under construction contracts valued at $6.5 million or more, without regard to the restrictions of the BAA[527] or the Balance of Payments Program.[528] The new rules do not apply to DOD procurements unless the product is listed in the *DFARS*.[529]

2. General Agreement on Tariffs and Trade (GATT) Approved.—After quick approval by Congress, President Clinton signed a new GATT agreement on December 8, 1994.[530] Generally, the GATT will reduce or eliminate tariff and other barriers to world trade, and establish a new World Trade Organization. The GATT includes a new Agreement on Government Procurement (AGP) which requires signatories to provide nondiscriminatory, timely, and effective bid protest procedures, but excludes preference programs for small and minority businesses.[531] The AGP will take effect on January 1, 1996.

---

[518] The court noted that Congress gave agencies broad discretion to implement the remedial goals of the Small Business Act and provide "the maximum practicable opportunity" for SDB participation in federal procurement. *See* 15 U.S.C. § 644(g).

[519] Adarand Constructors, Inc. v. Pena, 16 F.3d 1537 (10th Cir. 1994), *cert. granted*, 115 S. Ct. 41 (1994).

[520] B-254909, Jan. 25, 1994, 94-1 CPD ¶ 40.

[521] *See* 15 U.S.C. § 637(a) (authorizing the SBA to enter contracts with other agencies and arrange for performance by letting subcontracts to socially and economically disadvantaged small business concerns).

[522] The requirement had been performed for over two years by Skyline Government Services Corporation. McNeil purchased Skyline about nine months prior to HHS's offering the requirement to the SBA, thereby becoming the incumbent contractor.

[523] *See* 13 C.F.R. § 124.309(c) (1994) (prohibiting the SBA from accepting a proposed procurement into the 8(a) program if the SBA has made a written determination, after considering "all relevant factors," that an 8(a) award would have an adverse impact on an "individual small business." The SBA presumes adverse impact when a small business concern has, inter alia, performed a specific requirement for at least 24 months).

[524] *See also* American Mutual Protective Bureau, B-243329.2, June 16, 1994, 94-1 CPD ¶ 371 (holding that the SBA has the responsibility for defining what constitutes a "relevant factor").

[525] Pub. L. No. 103-182, 107 Stat. 2057 (1993).

[526] 59 Fed. Reg. 544 (1994) (effective Jan. 1, 1994, amending *FAR* parts 5, 14, 15, 17, 25, and 52).

[527] 41 U.S.C. §§ 10a-10d. The BAA generally requires that contractors supplying manufactured end items to the government provide only articles that have been manufactured in the United States substantially from materials produced in the United States.

[528] FAR 25.402(a)(3). Higher thresholds apply to procurements by the Department of Energy's Power Marketing Administration.

[529] *See* DFARS 225.403-70, Products Subject to Trade Agreement Acts.

[530] *See President Signs World Trade Pact*, DAILY PROGRESS, Dec. 9, 1994, at A3. *See also Over 100 Nations Sign GATT Accord*, 61 Fed. Cont. Rep. (BNA) 536 (Apr. 25, 1994).

[531] *See Congress Delays Action on GATT*, 36 Gov't Contractor (Fed. Pub. Inc.) ¶ 503 (Oct. 5, 1994).

3. Court Applies Christian Doctrine, Replaces BAA Clause.—In *S.J. Amoroso Construction Co. v. United States*,[532] the Corps of Engineers included the wrong BAA clause in a construction contract.[533] The Corps subsequently advised the contractor that it would consider each steel piece used to construct the building "singularly and separately" in determining compliance with BAA requirements.[534] The contractor filed a claim for its additional costs in furnishing domestic steel, asserting that the contract clause permitted it to consider the entire group of steel pieces for determining compliance with the BAA.[535] The Federal Circuit sustained the Corps's denial of the claim, holding that the *Christian* doctrine[536] mandated the inclusion of the proper BAA clause in the contract by operation of law. Applying the proper clause,[537] the court agreed with the Corps that each item of construction material brought to the site must meet the requirements of the BAA at the time of delivery.

K. Protests

1. General Accounting Office.—

a. Jurisdictional Issues.—

(1) The GAO Lacks Jurisdiction Over Randolph-Sheppard Act Disputes.—In *Mississippi State Department of Rehabilitation Services*,[538] the Air Force issued an RFP for cafeteria support operations. Pursuant to guidance contained in the Randolph-Sheppard Act,[539] the RFP included a clause advising offerors that the Air Force would give priority to blind vendors in making award. The Air Force subsequently determined that the protester's offer fell outside of the agency's competitive range. Protester, a qualified vendor covered by the Act, challenged the agency's decision as improper under the terms of the Randolph-Sheppard Act. Noting that the Randolph-Sheppard Act provides agencies exclusive authority to resolve disputes arising under the Act,[540] the GAO dismissed the protest for lack of jurisdiction.[541]

(2) Disputes Involving Cable Television Franchise Provisions Not Reviewable by the GAO.—In *Americable, International, Vandenberg, Inc.*,[542] the protester, an incumbent franchisee, alleged that an agency's solicitation to provide cable television services constituted an improper cable franchise renewal process. The GAO declined to consider the protest, finding the protest involved the cable franchise provisions of the Cable Communications Policy Act of 1984,[543] which expressly provides for judicial resolution of such disputes.

(3) Protest Alleging Misclassification of Sole Source Synopsis Untimely.—In *Allerion Inc.*,[544] the protester sent a letter stating its interest in submitting a proposal on a potential sole-source acquisition advertised in the *CBD*, but well after the time period allowed for such responses.[545] In its letter, the protester also informed the agency that it had misclassified its

---

[532] 12 F.3d 1072 (Fed. Cir. 1993).

[533] *Federal Acquisition Regulation* 25.205(a) requires the contracting officer to use the clause at *FAR* 52.225-5, Buy American Act—Construction Materials, in all construction contracts. The contracting officer mistakenly used a clause pertaining to NAF contracts.

[534] *S.J. Amoroso*, 12 F.3d at 1074. The Corps's position was consistent with the requirements of *FAR* 52.225-5, which requires the contractor to use only domestic construction material. Construction material is defined as material "brought to the construction site for incorporation into the building or work."

[535] The contract clause generally required the contractor to supply "domestic source end products," and defined end products to include materials "required under this contract for public use." *Id.* at 1076.

[536] *See* G.L. Christian & Assoc. v. United States, 312 F.2d 418 (Ct. Cl. 1963), *reh. denied*, 320 F.2d 345 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 954 (1964) (holding that a mandatory contract clause expressing a significant or deeply ingrained public policy will be read into the contract by operation of law).

[537] FAR 52.225-5.

[538] B-250783.8, Sept. 7, 1994, 94-2 CPD ¶ 99.

[539] 20 U.S.C. §§ 107-107f, as implemented by 34 C.F.R. pt. 395 (1993). The Randolph-Sheppard Act provides that, in authorizing the operation of vending facilities on federal property, "priority shall be given to blind persons licensed by a state agency." "Vending facilities" include cafeterias and snack bars.

[540] 20 U.S.C. § 107d-2; 34 C.F.R. § 395.37(b) (1993).

[541] Additionally, the GAO noted that it had taken a similar position with respect to disputes founded on other socio-economic statutes (*e.g.*, determinations by the Committee for Purchase from People Who Are Blind or Severely Disabled, pursuant to the Javits-Wagner-O'Day Act, 41 U.S.C. §§ 46-48c; responsibility determinations made by the SBA pursuant to 15 U.S.C. § 637(b)(7)).

[542] B-257953, Aug. 23, 1994, 94-2 CPD ¶ 161.

[543] 47 U.S.C. §§ 521-559.

[544] B-256986, Apr. 28, 1994, 94-1 CPD ¶ 281.

[545] *See* FAR 5.203.

procurement in the *CBD*.[546] When the agency opted to sole-source the contract, the contractor protested. The GAO found that, at most, the contractor's protest window extended to the ten-working-day time frame following its letter of interest. Because the protest was filed thirteen working days after the date of the letter, the GAO dismissed the protest as untimely.

(4) Challenge to Terms of Licensing Agreement Governed by Ten-Day Rule.—In *Total Procurement Services*,[547] an agency issued draft licensing agreements for the fielding of the DOD electronic commerce program.[548] After a presolicitation conference, the agency published a final version of the licensing agreement; however, this version contained neither a requirement for acknowledgement by the offerors nor a closing date for receipt of executed agreements. Six weeks after the agency issued the final agreement, a contractor protested the agreement as incomplete. Dismissing the protest as untimely, the GAO held that, absent any specific closing or response deadline, the ten-day rule applied.[549]

(5) Timeliness of Agency-Level Protest Determined by GAO Regulations.—In *National Environmental Services Co.—Recon.*,[550] the protester mailed its agency protest on the tenth working day after learning the basis for its protest. The agency did not receive the protest until the following day. The protester contended that, absent a contrary agency definition, the date of mailing rather than date of receipt by the agency constitutes "filing."[551] The GAO dismissed the protest as untimely, finding that, absent more stringent time requirements set by the agency, the GAO Bid Protest Regulations control.[552] Hence, the agency's receipt of the protest constituted the filing date.[553]

(6) Protest Based on Information Discovered as Interested Party in Separate Dispute Not Timely.—To avoid the unnecessary disruption of the procurement process, the GAO requires protesters to "diligently pursue" information that may reveal the grounds of protest.[554] In *Technology Management & Analysis Corp.*,[555] the protester, "after a lengthy period of inaction,"[556] intervened as an interested party in a competitor's protest. The protester did not challenge the evaluation of its proposal until receipt of the agency administrative report—nine weeks after the date of contract award. Dismissing the protest as untimely, the GAO held that the mere act of intervening in the protest of another party did not constitute the diligent pursuit of information.

b. Protective Orders—

(1) The GAO Denies Admission to Protester's Consultants Under Protective Order.—In *EER Systems Corp.*,[557] the GAO issued a protective order for a protest involving a procurement of engineering services.[558] The protester sought the admission of three engineering consultants who were practicing professors at a local university. The prospective awardee objected to their admission, stating that the engineering solutions used in its proposal were unique and would be invaluable to any practicing engineer. In reviewing the protective order applications of the professors, the GAO considered: the need for expert assistance in rendering a decision; the protester's need for experts to pursue its case; the nature and sensitivity of the protected material; and, the risk of inadvertent disclosure should admission be granted. Convinced that the proprietary data at issue was very valuable, and concluding that it could decide the protest without input from the protest-

[546] The protester alleged that the agency had classified computer maintenance services as "General Purpose ADP Equipment."

[547] B-255934.3, Aug. 16, 1994, 94-2 CPD ¶ 74.

[548] The FASA requires government agencies to implement the Federal Acquisition Computer Network (known as FACNET) for simplified acquisitions (*i.e.* procurements costing less than $100,000). *See supra* note 107 and accompanying text. By 1995, the DOD plans to conduct 75% of its business transactions electronically.

[549] *See* 4 C.F.R. § 21.2(a)(2) (1994) (requiring protests to be filed no later than ten working days after the basis of protest is known or should be known, whichever is earlier).

[550] B-254377.2, May 20, 1994, 94-1 CPD ¶ 317.

[551] *Cf.* DFARS, app. A, Rules of Armed Servs. Board of Cont. Appeals 1(a) (requiring notice of appeal to be "mailed or otherwise furnished to the board within 90 days"); Micrographic Technology, Inc., ASBCA No. 25577, 81-2 BCA ¶ 15,357.

[552] *See* 4 C.F.R. § 21.2(a)(3) (1994).

[553] *Id.* § 21.0(g).

[554] *See* Adrian Supply Co.—Recon., B-242819.4, Oct. 9, 1991, 91-2 CPD ¶ 321.

[555] B-256313.3, May 9, 1994, 94-1 CPD ¶ 299.

[556] The protester did not intervene for more than a month after the filing of the protest by the competitor. *Id.* at 4 n.3.

[557] B-256383.2, June 7, 1994, 94-1 CPD ¶ 354.

[558] *See* 4 C.F.R. § 21.3(d) (1994). The protective order process used by the GAO is an attempt to ensure that proprietary and source selection sensitive information is not released in a manner that would cause future competitive harm.

-er's experts, the GAO denied the consultants access under the protective order.

(2) The GAO Revises Bid Protest Protective Order Package.—In October 1994, the GAO issued a revised protective order package for use by parties to a protest.[559] Among the revisions are new application formats for inhouse and outside counsel. Additionally, the protective order requires a two-day "cooling-off" period. During this time, parties admitted under the order must refrain from releasing any material not marked as protected to anyone not admitted under the order. This will allow parties additional time to ensure that protected material is properly marked as such. The GAO is also revising the application format for use by consultants.

c. Protest Costs and Fees.—

(1) Time Is Money: Protester Fails to Timely Request Costs Incurred in Successful Protest.—A successful protester seeking compensation of costs associated with prosecuting its protest must file a cost claim within sixty days of receipt of the GAO's decision, unless good cause is shown.[560] In *Continental Maritime of San Diego, Inc.—Claim for Cost,*[561] the protester filed its cost claim more than 100 days after the GAO issued the underlying decision, arguing that "it never imagined" it would be required to tabulate and certify the time and expense associated with pursuing its case. Presented with an "unparalleled and complex task," the protester contended that its delay fell within the good cause exception.[562] The GAO disagreed, holding that the protester should have known that it might be required to account for its costs. Additionally, the GAO noted that it generally applies the good cause exception only to delays attributable to circumstances beyond the control of the protester.

(2) Agency's Corrective Action Taken Two Months After Protest Deemed Timely.—Since 1991, the GAO has had the authority to declare a successful protester entitled to the reasonable costs of pursuing its case, even if the agency takes corrective action prior to the issuance of a decision.[563] The key is whether the government acts expeditiously, given the complexity and underlying facts of the protest. The GAO usually will find the protester entitled to such costs when an agency "unduly delays" taking corrective action.[564] However, no bright line rule governs when an agency's corrective action will be deemed untimely. In *Atlas Powder International—Entitlement to Costs,*[565] the agency did not take corrective action for almost two months after the filing of the protest. In light of the "sheer number of allegations" and the technical complexity of the case, the GAO concluded that the agency's response was timely and denied the protester's request for costs.[566]

(3) An Expensive Sanity Check: Attorneys' Teaming Arrangement Results in Disallowed Protest Costs.—An agency ought not to relax simply because the GAO finds a protester entitled to costs and fees associated with prosecuting its protest. Agencies should ensure that the costs requested by protester are reasonable and adequately documented. In *Fritz Cos.—Claim for Costs,*[567] the GAO took exception to the costs underlying a rather "top-heavy" attorney teaming arrangement used by the protester's law firm. The GAO noted that protests filed by law firms usually are staffed by one or more associates who are then supervised by a partner within the firm. In this case, however, the law firm used *two* partners to pursue the protest. The GAO found that much of the work performed by the second partner unnecessarily duplicated that of his colleague and reduced those costs accordingly.

2. General Services Administration Board of Contract Appeals.—

a. The Litigation Waltz: Timing Is Everything.—To be timely, a contractor must file its GSBCA protest within ten working days of when it knew or should have known of the

[559] *See* Bid Protests: GAO Revises Standard Protective Order, Application Format and Process, 62 Fed. Cont. Rep. (BNA) 523 (Nov. 21, 1994).

[560] 4 C.F.R. § 21.6(f)(1) (1994).

[561] B-249858.5, Dec. 17, 1993, 93-2 CPD ¶ 323.

[562] *Id.* at 3.

[563] 4 C.F.R. § 21.6(e) (1994); Metters Indus.—Entitlement to Costs, B-240391.5, Dec. 12, 1991, 91-2 CPD ¶ 535.

[564] Oklahoma Indian Corp.—Claim for Costs, B-243785.2, 70 Comp. Gen. 558, 91-1 CPD ¶ 558 (1991).

[565] B-254408.5, Apr. 26, 1994, 94-1 CPD ¶ 278.

[566] *Id.* at 2. *Compare Id. with* Griner's-A-One Pipeline Servs., Inc., B-255078.3, July 22, 1994, 94-2 CPD ¶ 41 (finding that agency "impeded the economic and expeditious resolution of the protest" by failing to take corrective action for one month after receiving consultant's report confirming validity of protest). Interestingly, the GSBCA generally will not afford the government such relief as the GAO provided in *Atlas Powder. See* Integrated Sys. Group, Inc. v. Department of Commerce, GSBCA No. 11974-C(11921-P), 94-1 BCA ¶ 26,399 (board expressly declined to adopt GAO practice even though protester acted with "commendable celerity").

[567] B-246736.7, Aug. 4, 1994, 94-2 CPD ¶ 58.

grounds for protest.[568] One of the first things an agency must do when responding to a new protest is to determine exactly when the "protest clock" started ticking. This may be an agency preaward action, contract award, or debriefing. In *Columbia Services Group, Inc. v. Department of Energy*,[569] the government notified the protester of its removal from the competitive range in a generally worded letter. During the debriefing, conducted more than three weeks after the date of the letter, the protester learned of the specific reasons for its elimination. Within ten working days, it filed a protest, citing the information it gleaned from the debriefing. Because the protester did not learn of the grounds for protest until the debriefing, the board found the protest to be timely.[570]

b. The Litigation Dance Card: Interested Parties and Intervenors.—

(1) Protester's Withdrawal Disqualifies It from Later Seeking Protest Costs.—The GSBCA will consider protests filed by an interested party, *i.e.*, "an actual or prospective . . . offeror whose direct economic interest would be affected by the award of the contract . . . ."[571] In *Booz-Allen & Hamilton, Inc. v. Department of Health & Human Services*,[572] the protester alleged that the agency improperly performed the cost/technical trade-off (CTTO) underlying the contract award decision. Following receipt of the protest file, the protester apparently concluded that the agency properly performed the CTTO and withdrew its protest. The protester then filed a second protest seeking costs it attributed to pursuing the initial protest. The protester contended that, but for alleged misstatements made by the agency during the debriefing, it would not have protested. Interestingly, the protester no longer disputed the agency's award decision. By dropping all allegations that could have overturned the agency's award determination, the board concluded that the protester no longer qualified as an interested party and dismissed the protest.

(2) Intervenor Allowed to Pursue Protest Despite Protester's Withdrawal.—Rule 5(b)(4) of the GSBCA Rules of Procedures[573] allows a party four working days from the date of notification to intervene in a previously filed protest. In *Atlis Federal Services v. Department of Health & Human Services*,[574] an intervenor timely filed its notice of appearance, which also happened to be within ten working days of the date of award. In this notice, the intervenor indicated its support of the protest counts as alleged, but did not raise any new grounds of protest. The protester subsequently withdrew its protest with prejudice, having reached a settlement with the agency. The intervenor objected to the terms of the settlement and requested that the board allow it to continue with the protest. The board granted the intervenor's request, holding that the intervention otherwise met the timeliness requirement for a protest.

(3) Intervenor Allowed in Board Protest Despite Protesting Same Procurement Before GAO.—The Brooks Act expressly prohibits parties from filing protests at both the GSBCA and the GAO regarding the same procurement.[575] In *Pindar Donnelley Partnership v. Department of Commerce*,[576] a vendor (GDI) filed two protests of an agency procurement with the GAO, contending that it had been improperly eliminated from the competitive range. Another competitor (Pindar) subsequently protested the proposed award of the same acquisition with the GSBCA, attacking the overall evaluation process. Learning of this new protest, GDI then requested permission to intervene as an interested party. The board held that when the entire evaluation process is challenged, a party that the agency has previously eliminated from the competitive range may be allowed to intervene, even though the time for protesting the exclusion has otherwise expired. Therefore, the GSBCA held that, although GDI could not participate as an intervenor of right, it could participate in the protest as a permissive intervenor.[577]

c. Protective Orders.—Like the GAO, the GSBCA attempts to safeguard the release of proprietary and source selection sensitive information through the use of protective orders. Of particular concern to parties in a protest is the risk

---

[568] 48 C.F.R. § 6101.5(b)(3) (1993).

[569] GSBCA No. 12999-P, 94-3 BCA ¶ 27,257.

[570] In light of the nexus between debriefings and the new protest window mandated by FASA § 1433, the timing of agency debriefings will assume greater importance. *See supra* note 12 and accompanying text.

[571] 40 U.S.C. § 759(f)(9).

[572] GSBCA No. 12870-P, 94-3 BCA ¶ 27,150.

[573] 48 C.F.R. § 6101.5(b)(4) (1993).

[574] GSBCA No. 12959-P, ____ BCA ¶ ____, 1994 WL 589498 (Oct. 13, 1994).

[575] 40 U.S.C. § 759(f)(1).

[576] GSBCA No. 12667-P, 94-2 BCA ¶ 26,672.

[577] The board specifically interpreted "permissive intervenor" to include "any entity that is an interested party and has proceeded with a protest of the same procurement at the GAO." *Id.* at 132,675.

of inadvertent disclosure of such sensitive information. In *Federal Computer Corp. v. Department of the Treasury*,[578] the protester's inhouse counsel was denied access to protected information because he was married to the corporate contracts manager. The board concluded that a "close familial relationship" between corporate management and persons seeking admission under the protective order presented an unacceptable risk of inadvertent disclosure of protected material.[579]

d. Protest Costs and Fees.—

(1) Travel and Attendance Costs of Agency Debriefing Allowed.—The board may award protest costs, including reasonable attorney fees, to a protester who demonstrates that an agency has violated applicable procurement statutes, regulations, or the conditions of a delegation of procurement authority.[580] In *HSQ Technology, Inc. v. NASA*,[581] the government challenged a successful protester's request for reimbursement of costs associated with its attorney's travelling to and attending the postaward debriefing. Noting that such costs ordinarily are not allowable, the board found the protester entitled to compensation because the counsel's activities were taken in preparation for filing the protest. Specifically, the board noted that the protester had retained outside counsel thirteen days before the debriefing and had demonstrated the intent to file its protest eleven days before the debriefing. The board concluded that the attorney's presence at the debriefing simply was part of the investigative process necessary in preparing a protest.[582]

(2) Federal Circuit's Order Vacating Board Decision Prevents Board from Awarding Costs.—In an unusual turn of events, the board found itself in the position of lacking a necessary statutory basis to award costs to a protester that otherwise prevailed in its protest. In *PRC, Inc. v. Department of the Air Force*,[583] the protester successfully challenged the government's award of a contract for the installation of local area networks (LANs). The awardee then appealed the board's decision to the Federal Circuit. While the appeal was pending, the government cancelled the procurement and incorporated "redefined" project requirements into an unrelated LAN acquisition. The protester then moved to dismiss the appeal as moot, and the Federal Circuit agreed, issuing an order vacating the board's decision. In light of the court's order, the board found its underlying decision in favor of the protester a nullity. Hence, the board ruled that it lacked the "necessary predicate for awarding costs"—a precedential decision upon which the board may make such an award.[584]

(3) Federal Circuit Finds That Board Interpreted Authority to Award Protest Costs Too Restrictively.—In *Sterling Federal Systems, Inc. v. NASA*,[585] the GSBCA limited the reimbursement of expert consultant fees and employee salaries to costs associated with those individuals appearing as witnesses before the board. The board held that, under the CICA, it could award only those costs that a federal court could statutorily allow.[586] On appeal, the Federal Circuit vacated the board's decision, finding that the CICA provided the GSBCA with the necessary discretion to define allowable litigation and bid preparation costs.[587] Although offering greater latitude to the board, the Federal Circuit also noted that "not every litigation expense, even if reasonable and necessarily incurred in litigation, should be borne by one's adversary."[588]

e. The Brooks Act and the Scope of Relief.—Perhaps one of the most significant differences between GSBCA and GAO protests is the extent to which the board will direct the agency to take corrective action when appropriate.[589] In *Computer Data Systems, Inc. v. Department of Energy*,[590] the board

---

[578] GSBCA No. 12754-P, 94-2 BCA ¶ 26,875, *recon. denied*, 94-2 BCA ¶ 26,876.

[579] *Id.* at 133,762. *See also* International Data Prods. Corp. v. Department of Health & Human Servs., GSBCA No. 12269-P, 93-2 BCA ¶ 25,806 (consultant who was the sister of the firm's president denied access to protective order).

[580] 40 U.S.C. § 759(f)(5)(C).

[581] GSBCA No. 12681-C, 94-2 BCA ¶ 26,944.

[582] *See also* Science Applications Int'l Corp. v. NASA, GSBCA No. 12696-C(12600-P), 94-2 BCA ¶ 26,943 (allowing preparatory costs, due in part to limited time, allowed vendors to file a protest).

[583] GSBCA No. 11864-C(11532-P), 94-3 BCA ¶ 27,159.

[584] *Id.* at 135,339.

[585] GSBCA No. 10000-C(9835-P), 92-3 BCA ¶ 25,118, *vacated sub nom.* Sterling Fed. Sys., Inc. v. Goldin, 16 F.3d 1177 (Fed. Cir. 1994).

[586] 28 U.S.C. §§ 1821, 1920.

[587] *Sterling Fed. Sys.*, 16 F.3d at 1177.

[588] *Id.* at 1187.

[589] *See* Isyx, GSBCA No. 9407-P, 88-2 BCA ¶ 20,781, *recon. denied*, 88-2 BCA ¶ 20,815 (withdrawing agency's DPA until agency institutes safeguards in its procurement procedures); Stanley Computers Sys., Inc. v. Department of Treasury, GSBCA No. 12700-P, 94-2 BCA ¶ 26,715 (revoking agency DPA and transferring it to GSA).

[590] GSBCA No. 12824-P-R, Aug. 4, 1994, 94-3 BCA ¶ 27,153.

again flexed its muscle in crafting a remedial order for the government. Describing the steps in its order as the minimum relief necessary to ensure a "level playing field" for all competitors, the board instructed the government to replace all voting members of the source evaluation board (SEB). The GSBCA also directed that the contracting officer "shall not participate in any manner in the procurement."[591] Finally, the board directed that agency counsel, who had defended against the protest, could have "no role whatsoever in commenting on the proposals or otherwise influencing the assessments made by the SEB."[592]

f. Settlement Agreements and Fedmail.—One concern of those individuals interested in the conduct of GSBCA protest activity is the occurrence of what is known as "Fedmail"—that is, an agreement whereby the government pays off a protester to abandon its cause of action without having secured any relief.[593] In *ICF Severn, Inc. v. NASA*,[594] the board critiqued a settlement agreement in which the protester agreed to drop its protest in return for the agency agreeing to pay the vendor's protest costs.[595] Describing this arrangement as "Fedmail," the board refused to direct that payment be made from the Permanent Indefinite Judgment Fund. In reviewing the protester's subsequent motion for reconsideration, the board, in even stronger language, described the agreement "as an intolerable situation" and denied the motion.[596]

g. Board Protest Activity Falls Significantly.—In its annual report of proceedings of the GSBCA, the board reported a thirty-eight percent drop in protest activity, from 287 to 179 protests.[597] During FY 1994, the board disposed of 149 protests. Of these 149 protests, excluding protests voluntarily dismissed at the request of the parties, the board took the following actions: granted, in whole or in part, eighteen percent; denied forty-six percent; and dismissed by decision thirty-six percent.[598]

V. Contract Performance

A. Contract Interpretation

1. Patent Ambiguity Cases.—

a. What Is a "Patent" Ambiguity?—In *Reliable Building Maintenance Co. v. United States*,[599] the Court of Federal Claims denied a custodial services contractor's claim for costs incurred in dusting areas above seven feet high. Although the specification literally said that high dusting required removing dust from "all surfaces 7' 0" above the top of the floor surface," the court said a reasonable contractor reading the entire contract should have interpreted the requirement to involve cleaning *above* the seven-foot line, and that if there were an ambiguity, the ambiguity was patent. It defined a "patent" ambiguity as "an obvious omission, inconsistency, or discrepancy of significance,"[600] that exists "when a contractor's interpretation produces a conflict that cannot be reconciled with the plain meaning of another clause in the contract."[601]

b. Old Military Specification Still Good.—In *Rex Systems, Inc.*,[602] a contractor making printed circuit boards claimed delay costs for the government's failure to timely approve first article test results. The contractor based its claim on a military specification (MILSPEC) that superseded an older MILSPEC referenced in the solicitation and shortened the period for first article test result approval. However,

---

[591] *Id.* at 135,323.

[592] *Id.*

[593] *See supra* note 50 and accompanying text.

[594] GSBCA No. 11552-C(11334-P), 92-1 BCA ¶ 24,736, *recon. denied*, 94-3 BCA ¶ 27,162.

[595] The protester sought $265,000 in protest costs.

[596] *ICF Severn*, 94-3 BCA ¶ 27,162, at 135,357.

[597] *GSBCA Reports 38% Drop in Protests, 17% Drop in Contract Appeals in FY 1994*, 62 Fed. Cont. Rep. (BNA) 477 (Nov. 7, 1994).

[598] Interestingly, the composition of the board changed significantly in 1994. Two judges either resigned or retired, and one judge passed away. Through the combined efforts of the board, the impact on parties in protest litigation has been minimal. One case, however, reflected the effect the loss of board members can have. In Integrated Sys. Group, Inc. Dep't of Treasury, GSBCA No. 11214-P-R ____ BCA ¶ ____, 1994 WL 56057 (Oct. 6, 1994), the protester sought reconsideration of the board's earlier decision in which the above three judges served as the panel. Observing that the Federal Circuit previously had instructed the board that it could not change the panel composition between the underlying case and a hearing on reconsideration, *see* Universal Restoration, Inc. v. United States, 798 F.2d 1400, 1406 n.9 (Fed. Cir. 1986), the Board Chairman ruled that reconsideration was impossible and dismissed the case.

[599] 31 Fed. Cl. 641 (1994).

[600] *Id.* at 644 (quoting Beacon Constr. Co. v. United States, 314 F.2d 501, 504 (Ct. Cl. 1963)).

[601] *Id.* (quoting Solar Turbines Int'l v. United States, 3 Cl. Ct. 489, 497 (1983)).

[602] ASBCA No. 45874, 94-1 BCA ¶ 26,370.

the solicitation never cited the newer MILSPEC. In denying the contractor's claim, the ASBCA held that if the contractor knew of the newer MILSPEC prior to bid opening, the contractor's knowledge created a patent ambiguity that the contractor had to clarify. Additionally, the board held that the adoption of the newer MILSPEC did not give the contractor the right to interpret the solicitation to render the older MILSPEC reference meaningless.

c. Board Creates the "Busy Bidder" Rule.—The government awarded a contract to repaint a 100-ton gantry.[603] The contract stated that the lead content of the old paint was "500,00 mg/kg." When preparing its bid, the contractor took the notation to mean either 500 mg/kg or 50,000 mg/kg, either of which would permit normal disposal. However, the actual lead content was 500,000 mg/kg, which required the contractor to transport the old paint out of state for disposal. When the contractor filed a claim for the additional transportation cost, the government denied the claim, contending that the notation created a patent ambiguity. The board created a two-part test to determine whether an ambiguity is patent. An ambiguity is patent if it (1) is obvious or serious; and (2) should have been detected by a reasonable, but busy, prospective bidder attempting to prepare a responsive, timely, and competitive bid. Using this test, the board found that the misplaced comma was not an obvious defect and held for the contractor.

d. Contractor Not Held to Near-Microscopic Examination of Drawings.—In a contract for converting an electrical system, the contract drawings indicated a "transfer switch." However, on a very detailed examination of the drawings and the drawing notes,[604] one could discover that the project required a different type of switch. The government argued that the conflict between the drawings and the drawing note was a patent ambiguity that the contractor should have clarified, but the board disagreed. The board indicated that a normal bidder would not have examined the drawings in the required degree of detail during bid preparation. Because the discrepancy was not "obvious," the conflict was a latent ambiguity for which the government was liable.[605]

e. Nonexistence of Required Supply Equals Patent Ambiguity.—In *J.K. Richardson Co.*,[606] the contract required the construction contractor to provide a particular model of divider curtain. Prior to award, the contractor discovered that the particular divider curtain listed in the specification was unavailable, and based its bid on an industry standard curtain. After award, the government rejected the contractor's submittal of the industry standard curtain and required the contractor to supply a higher-priced curtain. The contractor claimed the additional costs to comply, but the board denied the claim, stating that when the contractor discovered that the divider curtain referenced by the government was no longer available, it should have clarified this patent ambiguity before award.[607] The board also reiterated the government's right to reject noncompliant goods, even if the requirement is met by only one source.

2. *Prior Course of Dealing May Be Relevant.*—In *Superstaff, Inc.*,[608] a course of dealing created through prior contracts was the government's downfall. In *Superstaff*, a commissary contracted for shelf stocking services. The contract was silent concerning the contractor's staging area (the temporary storage area for stock items), but prior contracts allowed the contractor to use the sales floor. Additionally, the contractor conducted a postaward familiarization visit and saw the sales floor used as a staging area. When the commissary ordered the contractor to use a different area, the contractor claimed for its additional costs. The board held for the contractor because the contract was silent concerning the staging area, the contractor was aware of the prior contracts that allowed the use of the sales floor, and there was nothing that the contractor could have discovered through its familiarization visit that would have revealed a change in that prior practice.

3. Ejusdem Generis: *If It Is Not Listed, It Is Not Included.*—In *Kimmins Contracting Corp.*,[609] the Air Force awarded a contract to repair and renovate a plating shop. The contract required the contractor to "sandblast metal," and referenced another contract section that listed "exposed structural steel columns, beams, girts, girders, and support steel" as items to

---

[603] Foothill Eng'g, IBCA No. 3119-A, 94-2 BCA ¶ 26,732.

[604] The problem was hidden in Drawing Note #8. There were 29 drawing notes involved.

[605] Ryan Co., ASBCA No. 41235, 94-1 BCA ¶ 26,539.

[606] ASBCA No. 46309, 94-2 BCA ¶ 26,900.

[607] *See also* Jamco Constructors, Inc., VABCA No. 3271, 94-1 BCA ¶ 26,405 (requiring bidders to clarify *all* patent ambiguities); Consultores Professionales De Ingeneria, S.A., ENG BCA No. PCC-78, 94-2 BCA ¶ 26,652 (holding that contract stating "rock material would not be encountered" but also containing boring reports indicating "weathered rock" contained patent ambiguity).

[608] ASBCA No. 46112, 94-1 BCA ¶ 26,574.

[609] ASBCA No. 43800, 94-2 BCA ¶ 26,608.

sandblast. When the Air Force required the contractor to sandblast metal pipes, the contractor claimed its additional sandblasting costs. The board held that under the doctrine of *ejusdem generis*,[610] the Air Force's failure to specifically include the piping in the list of items to sandblast, or to indicate that the list was nonexclusive, created a presumption that the piping was excluded. Accordingly, the order to sandblast the piping was a compensable change.

4. Contra Proferentem—Another Latin Phrase Bites the Government.—In *Fuller Commercial Asset Management, Inc. v. General Services Administration*,[611] the GSA leased office space for the Customs Service. Later, the GSA entered into a supplemental agreement with the lessor to cover additional electrical costs of running new heating, ventilation, and air conditioning units. The parties thereafter entered into a second supplemental agreement to cover "additional electricity" required for cooling certain rooms on a twenty-four-hour basis. Attempting to reduce its rental payments, the GSA then claimed that the lessor was double-billing it for electrical costs. The board held that the contractor reasonably interpreted the "additional electricity" provision in the second supplemental agreement as referring only to the electrical costs not covered in the first agreement; therefore, under *contra proferentem*, the contractor could recover.

5. But . . . No Contra Proferentem If Both Parties Draft Contract.—The GSA entered a lease for an office building which provided that the GSA was liable for increases in "real estate taxes."[612] Later, the parties disagreed over whether the GSA was liable for increases in real estate taxes on a parking lot used by GSA employees that was across the road from the leased building. The lessor argued that the GSA should be liable based on *contra proferentem*, but the board disagreed, holding that the theory could not apply to a negotiated lease because both parties were involved in the negotiation process, and there was no "drafter" to hold liable on a *contra proferentem* theory. Because the lease failed to make any reference to the parking lot, all references to "square foot" were to the building.

6. Contractor Cannot Ignore Trade Usage.—In *Northwest Marine, Inc.*,[613] the Navy issued a solicitation for a ship overhaul contract that included drawings showing locations of ship lights that were not to scale. After award, the government directed the contractor to place the lights in different locations from those shown on the drawings. Asserting that the specifications and drawings were defective, the contractor claimed additional costs. The board denied the claim because the evidence showed that it was customary in the ship overhaul trade for drawings to show light locations on a not-to-scale basis, and, therefore, the contractor should have known that some deviation from the drawing locations was likely.[614]

7. . . . But Neither Can the Government.—The government awarded a contract for a new membrane roof which required the contractor to provide a warranty that the roof would withstand sustained winds of seventy-five miles per hour.[615] In accordance with trade practice, the contractor based its bid on a combination fastening system (part mechanical, part adhesive). Nevertheless, the government required the contractor to fasten *all* portions of the room by *both* mechanical and adhesive means. The board upheld the contractor's claim for the additional installation costs, finding that the requirement was a latent ambiguity,[616] thus allowing the contractor to rely on trade practice.[617]

8. Contractor Bound by Prebid Comments.—When an apparent low bidder was asked to verify its bid, it stated that it understood the minimum manning requirements of the contract. After award, the contracting officer took deductions from the contract price because the contractor failed to meet the minimum manning requirements. The contractor appealed the deductions, claiming that the manning requirements were merely a means of performance rather than a binding requirement. However, in *Sterling Services, Inc.*,[618] the board dis-

---

[610] Literally, "of the same kind, class, or nature." Under this doctrine, when general words follow an enumeration of specific items, such general words are not to be construed in their widest extent, but only regarding those items of the same general kind or class as those specifically mentioned. BLACK'S LAW DICTIONARY 517 (6th ed. 1990).

[611] GSBCA No. 11865, 94-2 BCA ¶ 26,669.

[612] Prince George Ctr., Inc. v. General Servs. Admin., GSBCA No. 12289, 94-2 BCA ¶ 26,889.

[613] ASBCA No. 43502, 94-1 BCA ¶ 26,521.

[614] *See also* Allen L. Bender, Inc., ASBCA No. 46293, 94-2 BCA ¶ 26,916 (finding custom and trade usage required contractor to provide access panels to electrical junction boxes).

[615] Shirley Constr. Corp., ASBCA No. 46670, 94-2 BCA ¶ 26,868.

[616] The government conceded the ambiguity in part when it wrote the contractor that certain parts of the fastening specification were "irrelevant," and when the contracting officer's representative stated that he did not think that the contract required the fastening as ordered.

[617] *But see* International Transducer Corp. v. United States, 30 Fed. Cl. 522 (1994) (holding that contractor may not recover for latent ambiguity if its interpretation is unreasonable).

[618] ASBCA No. 46824, 94-2 BCA ¶ 26,912.

agreed, and held that the contractor's prebid communications during the bid verification process bound the contractor to its interpretation that the manning requirements were mandatory.

9. But the Government Is Bound as Well.—In *Sharon F. Graves*,[619] a bidder on a letter carrier contract noted an apparent ambiguity in the number of boxes requiring casing of mail prior to delivery. Per the solicitation's guidance, the bidder contacted the postmaster involved. The postmaster advised that only 475 boxes required casing, although actual performance demonstrated that the route required casing 641 boxes. When the carrier claimed for the additional casing expense, the board held that the carrier properly relied on the postmaster's prebid statements, entitling the carrier to recover.

Similarly, in *General Atronics Corp.*,[620] the contractor responded to a government solicitation for data terminals by offering additional software packages. During negotiations, the parties referred to the software packages as "options," but the memorandum of agreement between the parties did not mention the packages. The government later claimed that the contract price included the software packages. On appeal, the board determined that the contractor could recover its additional software costs because the parties clearly treated the software packages as options.

10. Is It a Design or a Performance Specification?—Interwest Construction v. Brown[621] concerned a supply contract for chillers. The contract provided that the units had to generate 900 tons of cooling capacity, and had to either be free of ozone depleting substances (ODS) or have the capacity to later convert to non-ODS use. The contractor provided the machines, but after conversion to non-ODS use, the chillers could not produce the required 900-ton cooling capacity. The contractor argued that the specification was ambiguous, but the court held that the specification was a performance specification that the contractor had to meet.[622]

11. Government Must Keep up with Changing Times.—Not only must contractors keep up with the latest developments, but as *Kimmins Contracting Corp.*[623] demonstrates, so must the government. The contract in this case incorporated by reference a 1978 specification requiring the contractor to certify proper tightening of metal parts. The contracting officer required the contractor to maintain an on-site inspector to observe the proper installation and tightening of the parts. The contractor complied and then claimed for the labor costs of the inspector, alleging a constructive change. The board found that an earlier (1963) version of the incorporated specification required the contractor to have an on-site inspector. However, the newer 1978 version deleted the on-site inspector requirement. The board concluded that the contracting officer's directive was a constructive change and held the government liable.

12. Order of Precedence Clause Requires Clear Conflict.—Under the Specifications and Drawings for Construction clause,[624] specifications control over conflicting contract drawings. In *Reyco Construction Co.*,[625] a contractor claimed additional costs when the contracting officer required it to use epoxy grout, rather than a nonmetallic grout, when renovating a moving crane rail. The drawings clearly required epoxy grout, but the specifications only required "nonmetallic" grout that had to pass certain standards. The contractor allegedly based its bid on a cement-type grout rather than an epoxy grout. On appeal, the contractor asserted that the tests listed in the specifications were for cement-type grout, not epoxy grout, and therefore, the contracting officer's directive was a change from the controlling specification requirement. The board disagreed, holding that a contractor may only use an order of precedence clause if there is a *clear* conflict between a specification and a drawing. Because the tests listed in the specification could be used for either cement-type or epoxy grout, the specifications were so ambiguous that no clear conflict existed; thus, the contractor should have clarified the ambiguity.

B. Contract Changes

1. Constructive Changes.—

a. No Compensable Change for Volunteer Work.—The Postal Service awarded a contract for architect-engineering services, which required the contractor to review shop draw-

---

[619] PSBCA No. 3399, 94-2 BCA ¶ 26,788.

[620] ASBCA No. 46784, 94-3 BCA ¶ 27,112.

[621] 29 F.3d 611 (Fed. Cir. 1994).

[622] *See also* R.A. Edwards, Inc., ENG BCA No. 5985, 94-2 BCA ¶ 26,733 (contract included a performance specification even though the government limited the contractor to only four methods of performance).

[623] ASBCA No. 46340, 94-2 BCA ¶ 26,915.

[624] FAR 52.236-21. This special construction contract clause differs from the ordinary Order of Precedence clauses used in other sealed bidding contracts (*FAR* 52.214-29) and negotiated contracts (*FAR* 52.215-33), because in construction contracts, specifications supersede conflicting provisions in contract drawings, while in other contracts, such as supply contracts, drawings control over conflicting provisions in specifications.

[625] ASBCA No. 46245, 94-2 BCA ¶ 26,831.

ing submittals of construction contractors.[626] The contractor later complained of expending more hours in review than previously agreed, largely because the prime contractor did not adequately review subcontractor submittals before submitting them for final approval. The board denied the contractor's claim for the extra hours worked, holding that no authorized government person directed the contractor to begin a more detailed review of the submittals rather than reject them and return them to the prime contractor for correction. The contractor thus performed as a volunteer, without a constructive change to the contract.

A similar case involved a Navy construction contract.[627] The contract required the erection of 161 power poles, and the contractor requested the survey data to determine the pole sites. When the government did not respond by the next day, the contractor ordered its surveyors to survey the sites and then claimed over $11,000 in survey costs. The board denied the claim, holding that the contractor volunteered its services because there was no government direction to survey the sites.

b. No Compensable Change Without Contractor Performance.—In *Advanced Mechanical Services, Inc.*,[628] the government awarded a contract to supply aircraft stanchions. During performance, the parties disagreed over whether the contract required the contractor to mill one side of the stanchions. When the contractor refused to mill the stanchions, the government terminated the contract for default. The contractor then filed a claim for the additional cost of milling the stanchions. In denying the claim, the board stated that, had the contractor performed, the order to mill the stanchions could have resulted in a constructive change. Because the contractor never performed the government directive, however, the contractor never incurred costs of performing the directive, which precluded recovery.

c. Sheer Number of Changes on Same Contract Does Not Create a Constructive Change.—Sometimes the government makes numerous changes to the same contract. When that occurs, contractors frequently argue that the volume of changes is a "cumulative change," entitling them to compensation. In *Southwest Marine, Inc.*,[629] a contractor making repairs to a Coast Guard cutter argued that more than 200 change orders constituted a "cumulative change." The board rejected the contractor's argument, holding that the contractor failed to show cumulative disruption that was not compensated through the individual changes.

2. Government Interference Cases.—

a. Illegible Contract Drawings Not a Basis for Excusable Delay Claim.—In *Anchor Fabricators, Inc.*,[630] the contractor bid on a solicitation that contained illegible contract drawings. After award, the contractor claimed delay costs caused in part by the illegible drawings. In denying the claim, the board held that the contractor waived its right to claim additional costs by bidding on the contract without seeking legible drawings. However, the contractor did recover for delay caused by the government's failure to provide technical manuals as the contract required.

b. Interference Must Be by Same Agency That Awarded Contract.—In *Aoki, Inc.*,[631] a contractor for the Panama Canal Commission (PCC) claimed delay costs, asserting that it was unable to transport its heavy equipment across an Army-owned bridge because the Army was using the bridge. The board denied the claim, holding that the PCC and the Army were two separate contracting entities, and that unless evidence existed to show the agencies were acting in concert, the contractor could not impute interference by the Army to the PCC.

c. Fraud Investigation Held to Be Noncompensable Sovereign Act.—Based on allegations of fraud and safety violations made by a contractor's former employee, both the Defense Criminal Investigative Service (DCIS) and the Justice Department conducted an investigation of the contractor.[632] After completing the investigation, the Justice Department declined to prosecute. The contractor filed a claim for the extra costs incurred in defending itself during the investigation. In denying the claim, the ASBCA held that the investigations were sovereign acts of the government. Because the contractor failed to show that the DCIS, the Justice Department, and the contracting officer were involved in a conspiracy against the contractor, the contractor could not recover.

---

[626] Knight Architects Eng'rs Planners, Inc., PSBCA No. 3474, 94-3 BCA ¶ 27,178.

[627] Jowett, Inc., ASBCA No. 47364, 94-3 BCA ¶ 27,110.

[628] ASBCA No. 38832, 94-3 BCA ¶ 26,964.

[629] DOT BCA No. 1663, 94-3 BCA ¶ 27,102.

[630] ASBCA No. 42022, 94-2 BCA ¶ 26,659.

[631] ENG BCA No. PCC-95, 94-1 BCA ¶ 26,474.

[632] Orlando Helicopter Airways, Inc., ASBCA No. 45778, 94-2 BCA ¶ 26,751. *But see* R&B Bewachungsgesellschaft mBH, ASBCA No. 42213, 91-3 BCA ¶ 24,310 (holding that a disruptive criminal investigation by the government in its contractual capacity is compensable); Henderson, Inc., DOT BCA No. 2423, 94-2 BCA ¶ 26,728 (holding government liable for sovereign act due to implied warranty to the contractor).

d. Government Must Stay out of Contractor's Way.—Hudson Contracting, Inc.[633] demonstrates several ways that government interference can lead to constructive changes. The Navy awarded a contract to construct a storm drainage system at the Naval Construction Battalion Center in Gulfport, Mississippi. During contract performance, the Navy required the contractor to: (1) work on Thanksgiving Day, but did not provide an inspector to supervise the work; (2) remove trees along a ditch route on a piecemeal basis, rather than clear cutting; (3) postpone digging a trench so that no one could see dirt piles during a ceremony; and (4) dig up trenches to find leaks that did not exist. Additionally, the Navy did not require other contractors on the site to move their equipment so trenching could continue, and damaged the contractor's trenches by leaving fire hydrants on and rerouting water lines. The board easily found that the above incidents constituted interference and extra work, entitling the contractor to compensation.[634]

3. Superior Knowledge Cases.—

a. Superior Knowledge Applies Only During Contract Performance, Not Afterward.—Perhaps the most important superior knowledge decision during 1994 came from the Federal Circuit in *Hercules, Inc. v. United States.*[635] In this case, Hercules and other manufacturers of the Vietnam-era defoliant "Agent Orange" sued the United States for indemnification after settling class action claims brought by Vietnam veterans exposed to Agent Orange.[636] Among other theories of recovery, Hercules alleged that the government had a contractual obligation to inform Hercules of its proposed use of Agent Orange and, therefore, was, liable on a superior knowledge theory. The court stated that a superior knowledge claim exists when:

> (1) a contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration; (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information; (3) any contract specification supplied misled the contractor or did not put it on notice to inquire; and (4) the government failed to provide the relevant information.[637]

Using that analysis, the court rejected Hercules's claim because there was no evidence that the withheld information had any impact on either the cost or duration of its performance.[638]

b. What Is "Vital" Information?—One of the elements that contractors must prove to establish a constructive change based on a superior knowledge theory is that the information not disclosed by the government was "vital." The Court of Federal Claims attempted to define "vital" information in *Bradley Construction Inc. v. United States.*[639] The case involved the renovation of a medical facility on Indian tribal land. After contract award, the Indian tribe imposed a sewer connection fee on the contractor. The contractor paid the fee and then sought an increase in the contract price, alleging that the government failed to disclose vital information. The court held that, to show that information was "vital," a contractor only had to show that the withheld information actually affected performance costs. Nevertheless, the court denied the contractor's claim because the IFB stated that the Indian tribe could impose fees, and that prospective bidders should contact the tribe for further information.[640]

c. Contractor Must Discover Local Law.—The Army Corps of Engineers awarded a contract to construct a breakwater in San Juan, Puerto Rico.[641] When the contractor discovered that Puerto Rican law required it to pay its laborers double the regular hourly rate for all overtime hours, the contractor filed a claim alleging that the government had prior knowledge of the Puerto Rican requirement and failed to tell

---

[633] ASBCA No. 41023, 94-1 BCA ¶ 26,466.

[634] *See also* Hardrives, Inc., IBCA No. 2319, 94-1 BCA ¶ 26,267 (holding that government interfered with contractor's performance by failing to respond promptly to contractor's change proposals; contractor entitled to compensation under the Changes clause). *But cf.* Beauchamp Constr. Co. v. United States, 14 Cl. Ct. 430 (1988) (holding that government delays in issuing modifications are compensable under the Suspension of Work clause). Under a constructive change, the contractor is entitled to profit on incurred costs; profit is not a part of the adjustment under the Suspension of Work clause. *Compare* FAR 52.243-4, Changes, *with* FAR 52.212-12, Suspension of Work.

[635] 24 F.3d 188 (Fed. Cir. 1994).

[636] *See* In re "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

[637] *Hercules, Inc.*, 24 F.3d at 196 (quoting American Ship Bldg. Co. v. United States, 654 F.2d 75, 79 (Ct. Cl. 1981)).

[638] *See also* Kimmins Contracting Corp., ASBCA No. 42762, 94-3 BCA ¶ 26,990 (following court's guidance in *Hercules*, board finds government liable on superior knowledge claim).

[639] 30 Fed. Cl. 507 (1994).

[640] *See also* Miller Elevator Co. v. United States, 30 Fed. Cl. 662 (1994) (providing an excellent discussion of the theory of superior knowledge).

[641] Maitland Bros., ENG BCA No. 5782, 94-1 BCA ¶ 26,473.

prospective contractors. The board denied the claim, stating that the contractor could have discovered the Puerto Rican requirement with a reasonable inquiry, and, therefore, could not prevail on a superior knowledge theory.

4. Board Refuses to Aid and Abet out of Scope Change.—In *E.L. Hamm & Associates*,[642] the Navy leased a building from a contractor under the SBA's 8(a) program.[643] The lease did not contain an option to purchase clause. At the end of the last option period, the Navy discovered that it could not renew the lease with the SBA because the contractor was "graduating" from the 8(a) program.[644] Nevertheless, the contracting officer unilaterally modified the contract pursuant to the Changes clause[645] and effectively wrote a purchase option into the contract, transferring title of the building to the Navy upon the Navy's paying the contractor the building's salvage value. On appeal, the ASBCA strongly rejected the Navy's position,[646] holding that a change converting a lease to a lease-purchase contract was well beyond the scope of the contract for purposes of the Changes clause.[647]

5. Defective Specifications—Government Eats Another MRE Case.—Two years ago, the government lost a defective specification case because it failed to include salt in its recipe for chicken a la king in its Meals, Ready to Eat (MRE) field rations.[648] Unfortunately, the government struck out again in an MRE case.[649] This time, the problem surrounded the plastic and aluminum wrappers protecting the MRE fruit squares.[650] The wrappers were made according to a military specification included in the solicitation, yet the government rejected a large number because of tears in the wrapper after the fruit was vacuum sealed. The contractor claimed for its costs in attempting to comply with the contract, and the board found for the contractor. It held that there was no evidence that the contractor handled the wrappers improperly; because the wrappers were made based on a military specification, the government breached its implied warranty that the wrappers would be satisfactory for the contract.

6. Denial of Request for Excusable Delay Does Not Automatically Result in Constructive Acceleration.—The Department of Housing and Urban Development (HUD) contracted for reroofing of a housing project.[651] The contractor submitted several requests for delay, which the government returned for additional information. Later, the contractor claimed constructive acceleration when the government required the contractor to complete in accordance with the original schedule. The board denied the contractor's claim, holding that, for constructive acceleration to exist, the government's conduct must be tantamount to an order to accelerate. In this case, the government's denial of the delay requests because of the contractor's failure to provide proper information did not constitute an order to accelerate.

C. Inspection and Acceptance

1. Inspection.—

a. Inspection Clause Remedies Are Exclusive.—The standard Inspection clause[652] provides the government with specific remedies when a contractor delivers nonconforming goods, including the right to reject or require correction of the goods, and to correct or replace the goods if the contractor fails to do so promptly.[653] The clause also provides the government with postacceptance remedies, and states that these postacceptance remedies are "in addition to any other rights

---

[642] ASBCA No. 43792, 94-2 BCA ¶ 26,724.

[643] *See* 15 U.S.C. § 637(a) (authorizing the SBA to enter contracts with other agencies and arrange for performance by letting subcontracts to socially and economically disadvantaged small business concerns).

[644] *See* 13 C.F.R. § 124.208 (providing guidelines for small disadvantaged businesses to "graduate" from the 8(a) program after meeting the objectives and goals that it established when it entered the program and obtaining the ability to compete in the marketplace without SBA assistance).

[645] FAR 52.243-1.

[646] The board stated, "We are not authorized to take such action [ordering the transfer of title to the Navy] and decline the Navy's invitation to become its accessory, *i.e.*, aid and abet it in retaining the facility." *E.L. Hamm*, 94-2 BCA ¶ 26,724, at 132,999.

[647] To its credit, the Navy conceded that issue on appeal.

[648] International Foods Retort Co., ASBCA No. 34954, 92-2 BCA ¶ 24,994. For a quick summary, *see 1992 Contract Law Developments—The Year in Review*, ARMY LAW., Feb. 1993, at 39.

[649] Wornick Family Foods Co., ASBCA No. 41317, 94-2 BCA ¶ 26,808.

[650] An informal taste test demonstrates that only one in five soldiers can differentiate between the taste of the wrapper and the fruit squares.

[651] Franklin Pavlov Constr. Co., HUD BCA 93-C-13, 94-3 BCA ¶ 27,078.

[652] FAR 52.246-2, "Inspection of Supplies—Fixed Price."

[653] *Id.* 52.246-2(f), (h).

and remedies provided by law."[654] Applying the rule "expressio unius est exclusio alterius,"[655] the board in *General Electric Co.*[656] held that the government's *preacceptance* remedies for nonconforming goods are exclusive, because "the parties did not intend to reserve other rights and remedies."[657] The board concluded that the government could not recover breach damages from General Electric for costs incurred in testing and repair of defective goods, and for disruption to other work; such preacceptance costs are only recoverable "to the extent allowed by the remedial provisions of the Inspection clause."[658]

b. Government's Refusal to Allow Retest Renders Termination a Breach of Contract.—In *Praoil, S.r.L.*,[659] the government default terminated a jet fuel contract after a test sample exceeded maximum filtration time.[660] The contractor requested a retest, asserting that the sample test was not representative of the fuel, but the government refused. At trial, the contractor established that, because the sample test varied significantly with eight other sample tests, industry practice dictated a retest. The board held the termination improper because the government failed to prove that the sample test "conformed to applicable requirements."[661] The board further held that the improper default termination was a breach of contract because the default clause in the contract did not provide for conversion to a termination for convenience.[662]

2. Acceptance.—

a. Failure to List Salient Characteristics Prevents Rejection of Equal Products.—Recently, the ASBCA determined that, in a contract requiring a "brand name or equal" product,[663] the government could refuse to permit the contractor to substitute an "equal" product if the contractor failed to specify the equal product in its bid.[664] In *Zeller Zentralheizungsbau GmbH*,[665] the Army awarded a contract which required the contractor to supply brand name radon measuring devices.[666] Because the contractor failed to specify any different equipment with its offer, the government refused to accept the contractor's allegedly equal equipment and partially terminated the contract for default. The board sustained the contractor's appeal, holding that the Army's failure to list salient characteristics of the brand name products precluded rejection of equal products. The board reasoned that, without the salient characteristics, an offeror could not seriously evaluate alternatives to the brand name equipment before award.[667]

b. Reduction in Useful Life Precludes Finding of Economic Waste.—The Air Force required a contractor to replace concrete gutters at Falcon Air Force Station, Colorado, because the contractor failed to correctly place rebar and wire in the gutters.[668] Although the gutters as originally installed would have performed their intended purpose of carrying water, their useful life would have been reduced by five years.

---

[654] *Id.* 52.246-2(l).

[655] "The expression of one thing is the exclusion of the other."

[656] ASBCA No. 45936, 94-1 BCA ¶ 26,578.

[657] *Id.* at 132,240.

[658] *Id.* The board noted, however, that the government might recover common law damages for time delay costs under the "reservation of other rights and remedies provision" of the Default clause.

[659] ASBCA No. 41499, 94-2 BCA ¶ 26,840.

[660] The contract included a Defense Fuel Supply Center default termination clause (DFSC 1983 MAY) (Deviation).

[661] *Praoil, S.r.L.*, 94-2 BCA ¶ 26,840, at 133,502.

[662] *See infra* note 678 and accompanying text.

[663] *See* DFARS 252.210-7000, "Brand Name or Equal."

[664] Meisel Rohrbau, GmbH, ASBCA No. 35622, 93-3 BCA ¶ 26,222, *aff'd on recon.*, 94-1 BCA ¶ 26,530.

[665] ASBCA No. 43109, 94-2 BCA ¶ 26,657.

[666] The contract included a clause, "Identification of Material or Equipment," providing that the offeror would be "considered offering the brand name . . . unless he/she clearly specifies different products . . . ." *Id.* at 132,615. Although the contract also included *DFARS* 252.210-7000, "Brand Name or Equal," the board found that the clause did not apply because the brand name items were not identified in the schedule, as required by the clause.

[667] *See also* American Commercial Contrs., Inc. v. General Servs. Admin., GSBCA No. 11713, 94-3 BCA ¶ 26,973 (holding that, unless the contract specifies otherwise, "the contractor is permitted to supply an alternative to the brand name product if the alternative meets all of the essential requirements set forth in the specifications, functions the same as the brand name product, and provides the same standard of quality").

[668] Triple M Contrs., Inc., ASBCA No. 42945, 94-3 BCA ¶ 27,003, *recon. denied*, 94-3 BCA ¶ 27,221.

On appeal, the contractor asserted that the replacement constituted economic waste.[669] The board held for the government, finding that the contractor failed to render substantial performance.[670] In the absence of substantial performance, the government's order to replace the gutters did not constitute economic waste.[671]

c. Government Fails to Prove Helicopter Crash Was Caused by Latent Defect.—In *United Technologies Corp. v. United States*,[672] the government sought reconsideration of the court's decision granting the contractor summary judgment,[673] arguing that the contractor provided defective helicopter rotor spindles which caused a Black Hawk helicopter to crash in 1985. Citing postcrash data, the government asserted that the contractor's failure to implement proper test methodology caused the spindles to fail to meet the contractually required 10,000-hour fatigue life. The board rejected the government's argument, holding that the government was imposing a more stringent standard than that set forth in the contract and approved by the government. Finding the government's position to be based on an "error in logic," the court noted that the 10,000-hour fatigue life specification "was not an objective characteristic of the spindle," but could "only be understood with respect to specific test methodology" used by the contractor.[674] The court found further that, even if the spindles were defective, the government failed to demonstrate a latent defect; the government accepted most of the spindles while knowing that the contractor's test report (using a new test methodology) showed the spindles had only a 6700-hour fatigue life.

d. Prior Course of Dealing Precludes Rejection.—In *Unlimited Supply Co. v. General Services Administration*,[675] the government default terminated a purchase order for mixing bowls after determining that the bowls did not comply with the specifications. The contractor established on appeal that the government previously had accepted identical bowls on nineteen purchase orders. The board overturned the default termination, finding that the government was precluded from demanding strict compliance because it failed to advise the contractor, contrary to its prior course of dealing, that it would enforce the specifications.[676]

D. Terminations for Default

1. Decision to Terminate.—

a. Navy Terminated Contract in Bad Faith—Breach Damages Assessed.—In an excellent example of how *not* to administer a contract, the Navy in *Apex International Management Services, Inc.*,[677] default terminated a facilities operations contract at the Naval Air Station in Jacksonville, Florida. On appeal, the board found "irrefragable" evidence that government officials maliciously sought to prevent the contractor from successfully performing services previously rendered by government employees. Specifically, the board found that government employees had thrown the keys to vehicles and storage areas onto a roof and into trash dumpsters, dumped trash and debris into contractor work areas, removed telephones and air conditioners from contractor work areas, and issued emergency calls when no emergencies existed. The board concluded that these activities breached the contract, that the contractor was justified in ceasing performance, and that the Navy acted in bad faith by subsequently terminating the contract. Moreover, the board refused to convert the termination to a termination for convenience, and allowed the contractor breach damages and anticipatory profits.[678]

---

[669] *See* Granite Constr. Co. v. United States, 962 F.2d 998 (Fed. Cir. 1992), *cert. denied*, 113 S. Ct. 965 (1993).

[670] The board noted that the gutters were an "essential element in the main purpose of the contract," which was to protect a security system from erosion. *Triple M Contrs.*, 94-3 BCA ¶ 27,003, at 134,532. *See also* Thermodyn Contrs., Inc. v. General Servs. Admin., GSBCA No. 12510, 94-3 BCA ¶ 27,071 (finding no substantial performance even though building was 99% complete, where contractor had failed to install security system).

[671] *Compare Triple M Contrs., Inc.*, 94-3 BCA ¶ 27,003 *with* ANA-CA Constr. Corp., ASBCA No. 44375, 94-3 BCA ¶ 27,032 (finding the government constructively changed the contract by requiring replacement of concrete walls, because the government precluded the contractor from pursuing its own correction "which would provide full compliance with the contract"). The board in *Triple M* found no evidence of possible corrective measures. *Triple M Contrs.*, 94-3 BCA ¶ 27,003, at 134,530.

[672] 31 Fed. Cl. 698 (1994).

[673] United Technologies Corp. v. United States, 27 Fed. Cl. 393 (1992).

[674] *United Technologies Corp.*, 31 Fed. Cl. at 701.

[675] GSBCA No. 12371, 94-3 BCA ¶ 27,170.

[676] *Compare id. with* Kvaas Constr. Co., ASBCA No. 45965, 94-1 BCA ¶ 26,513 (holding that no course of dealing exists where government allowed deviation from specification on four prior contracts) *and* Nash Metalware Co. v. General Servs. Admin., GSBCA No. 11951, 94-2 BCA ¶ 26,780 (holding that contractor failed to prove prior course of dealing).

[677] ASBCA No. 38087, 94-2 BCA ¶ 26,842, *aff'd on recon.*, 94-2 BCA ¶ 26,852.

[678] The default clause for fixed-price supply and service contracts provides that if the contractor was not in default, or if the default was excusable, the rights and obligations of the parties shall be the same as under a termination for convenience. FAR 52.249-8(g). *Cf.* Praoil, S.r.L., ASBCA No. 41499, 94-2 BCA ¶ 26,840 (holding that improper default termination breaches contract where contract does not provide for conversion to a termination for convenience); Metzger Towing, Inc., ENG BCA No. 5862, 94-2 BCA ¶ 26,651 (improper default termination breached contract where clause provided only that "failure of the contractor to comply with the requirements of the contract specifications will be cause for termination for default. Termination for default will be immediate, by written notice.").

b. Is the Board's Standard for Default Terminations Too High?—No, according to the Department of Veterans Affairs Board of Contract Appeals, in a case which demonstrates the importance of thoroughly analyzing a contractor's performance prior to terminating a contract for default. In denying a government motion for reconsideration, the board rejected an argument that the board set "a standard that is extremely difficult to meet."[679] In its original decision,[680] the board found that the contracting officer abused his discretion by failing to make an "adequate inquiry" prior to terminating a construction contract for default. Although the contracting officer determined that a reprocurement contractor could complete the work "in a very short period of time," the board faulted the contracting officer for failing to reconcile contradictory information concerning the amount of work the defaulted contractor had completed, and for blindly accepting his technical representative's estimates of completion time for the defaulted contractor and a reprocurement contractor.[681] In denying reconsideration, the board stressed that the contracting officer must consider "all relevant circumstances" when exercising his discretion under the default clause, and give a reasoned consideration to all relevant factors without making assumptions that lack factual predicate or analysis. The board concluded by noting that the mere fact that a replacement contractor will take as long or longer to complete a contract "does not mean that the government is precluded from terminating a contractor in default," and that the failure of the contracting officer to consider all of the *FAR* 49.402-3(f) factors is not an "automatic ticket to a convenience termination by a defaulted contractor."[682]

2. Grounds for Termination.—

a. Violation of Labor Standard Reporting Requirements Provides Independent Basis for Default Termination.—In *Kelso v. Kirk Bros. Mechanical Contractors*,[683] the Navy had default terminated a refrigeration system contract, although it had not established a contractually binding completion date.[684] When the contractor appealed the termination to the ASBCA,[685] the Navy sought to sustain its default termination on the ground that the contractor did not comply with federal labor reporting standards.[686] The board rejected the Navy's argument and overturned the default termination, finding that the contractor's failure to retain time cards, and its omission of daily hours from certified payrolls, were inadvertent and did not adversely affect the government's ability to enforce federal labor standards. The Federal Circuit reversed the board, noting that it will "sustain a default termination if justified by circumstances at the time of termination, regardless of whether the government originally removed the contractor for another reason."[687] The court held that the contractor's violation of the reporting standards, although not related to contract performance, justified a default termination.[688]

b. "Poor Progress" Is Insufficient Basis to Terminate Contract.—The Air Force awarded a contract to dismantle and relocate four buildings at Hellenikon Air Base, Greece.[689] Three weeks before the scheduled completion date, the contracting officer issued a cure notice for failure to prosecute the work with diligence so as to timely complete performance.[690] After the contracting officer issued the show cause notice, the

[679] Jamco Constructors, Inc., VABCA No. 3271R, 94-2 BCA ¶ 26,792.

[680] Jamco Constructors, Inc., VABCA No. 3721, 94-1 BCA ¶ 26,405.

[681] *See* FAR 49.402-3(f)(4) (contracting officer must consider the urgency of the need for the supplies or services and the time required to obtain them from other sources, versus the time for delivery from the delinquent contractor).

[682] *Jamco Constructors*, 94-2 BCA ¶ 26,792, at 133,252.

[683] 16 F.3d 1173 (Fed. Cir. 1994).

[684] *See, e.g.*, Lanzen Fabricating, ASBCA No. 40328, 93-3 BCA ¶ 26,079 (failure to reestablish waived delivery date precluded termination).

[685] Kelso v. Kirk Bros. Mech. Contractors, ASBCA No. 35771R, 92-3 BCA ¶ 25,144.

[686] *See* 40 U.S.C. §§ 276a-276a-7 (Davis-Bacon Act); 40 U.S.C. § 276c (Copeland "Anti-Kickback" Act). Generally, the Davis-Bacon Act requires contractors to pay mechanics and laborers a "prevailing wage rate," as determined by the Department of Labor, on federal construction projects that exceed $2000. The Act specifically permits the government to terminate a contract for default for failure to comply with its provisions. The Copeland "Anti-Kickback" Act, as implemented by regulation, requires contractors to submit weekly payroll reports and statements of compliance for the wages paid to each employee, and to keep records for three years after contract completion. *See* 29 C.F.R. §§ 3.3, 3.4, 5.5 (1994). The requirements of the Davis-Bacon and Copeland "Anti-Kickback" Acts are included in federal construction contracts. *See, e.g.*, FAR 52.222-6, Davis-Bacon Act; 52.222-8, Payrolls and Basic Records; 52.222-12, Contract Termination-Debarment.

[687] *Kelso*, 16 F.3d at 1175. *See also* Joseph Morton Co. v. United States, 757 F.2d 1273 (Fed. Cir. 1985); Daff, Trustee in Bankr. for Triad Microsystems, Inc. v. United States, 31 Fed. Cl. 682 (1994) (government may justify default termination on subsequently discovered contractor fraud).

[688] *See also* Quality Granite Constr. Co., ASBCA No. 43846, 93-3 BCA ¶ 26,073, *aff'd*, 26 F.3d 138 (Fed. Cir. 1994) (contractor's failure to pay Davis-Bacon Act wages provides independent basis for termination; cure notice not required when contracting officer unaware of violations at time of termination).

[689] Technocratica, ASBCA No. 44134, 94-2 BCA ¶ 26,606.

[690] *See* FAR 52.249-10.

contractor responded that its lack of progress was due in part to the government's denial of site access for three months. Shortly thereafter, the government terminated the contract for default. At trial, the contracting officer testified that her decision to terminate was based on the contractor's "poor progress," not on its ability to complete the work by the completion date. In sustaining the contractor's appeal, the board held that poor progress alone is not an adequate ground to default a contractor; rather, the government must analyze progress problems against a specified completion date. The "specified completion date" must take into account the contractor's excusable delay, which includes the time the government improperly denied site access.

c. Failing to Comply with "Other Provisions" in Construction Contracts.—The construction default clause[691] does not expressly permit a termination for default for violation of "other provisions" of the contract.[692] Boards have wrestled with the issue of whether the government can default terminate a construction contract for violating "other provisions" of the contract absent express authority elsewhere in the contract.[693] In *Cole's Construction Co.*,[694] the Army Corps of Engineers default terminated an 8(a) construction contract when the contractor failed to provide performance and payment bonds by the due date.[695] The contract did not contain the "Bid Guarantee" clause.[696] The board determined that, to sustain the termination, the Corps had to prove that the contractor's failure to deliver satisfactory bonds on time endangered timely performance of the overall contract. The Corps was unable to show that there was no reasonable likelihood that the contractor could timely perform: the procurement was not urgent, the delay was minor (four-week delay on a sixty-four-week performance schedule), and the contractor made continuing good-faith efforts to secure the bonds. Accordingly, the board found the termination improper, and converted it to a termination for convenience.

In *Engineering Technology Consultants, S.A.*,[697] the Air Force successfully defended a default termination of a construction contract. The contractor failed to procure insurance for four months after signing a "Certificate of Compliance With Insurance Requirements," then procured a general liability policy with $100,000 in coverage rather than the required $500,000 limit. After issuing a cure notice and show cause notice, the contracting officer default terminated the contract. The board upheld the termination, finding that the government had "no alternative but to stop performance"; therefore, the contractor was unable to prosecute the work with the diligence required to ensure completion within the performance period.

d. Can the Government Demand Assurance on Construction Contracts?—The GSA default terminated a renovation contract in *Ranco Construction, Inc. v. General Services Administration*,[698] for failure to address the GSA's concerns expressed in a cure notice. On appeal, the board questioned whether the government had a common law right to terminate a construction contract when a contractor fails to provide adequate assurance of performance.[699] While noting that the *Uniform Commercial Code (UCC)* and the *Restatement (Second) of Contracts (Restatement)* provide for the right to demand adequate assurance of full performance,[700] the board determined that the *UCC* applies "only to contracts for the sale of goods" and that there is "very little precedent" to support extending UCC requirements to other types of contracts."[701]

---

[691] *Id.* 52.249-10, Default (Fixed-Price Construction).

[692] *Compare* FAR 52.249-10(a) *with* FAR 52.249-8(a)(1)(iii) (provides for default termination of supply and service contracts when the contractor fails to "perform any other provisions of this contract").

[693] Construction contracts contain numerous clauses authorizing termination in certain circumstances. *See, e.g.*, FAR 52.222-12, Contract Termination-Debarment; 52.236-15, Schedules for Construction; 52.246-12, Inspection of Construction; 52.228-1, Bid Guarantee. For an excellent discussion, *see Default Termination for Failure to Comply With "Other Provisions": Requiring Contractors to Do the Complete Job*," 8 NASH & CIBINIC REP. ¶ 24 (Apr. 1994).

[694] ENG BCA No. 6074, 94-3 BCA ¶ 26,995.

[695] The Miller Act, 40 U.S.C. § 270a, requires federal construction contractors to furnish performance and payment bonds for all contracts in excess of $25,000.

[696] FAR 52.228-1. This clause permits the government to default terminate a contract if the contractor "fails to execute all contractual documents or give a bond(s) as required by the solicitation within the time specified."

[697] ASBCA No. 43454, 94-1 BCA ¶ 26,586.

[698] GSBCA No. 11923, 94-2 BCA ¶ 26,678.

[699] *See* Fairfield Scientific Corp., ASBCA No. 21151, 78-1 BCA ¶ 13,082 (equating cure notice to a demand for adequate assurance of performance).

[700] U.C.C. § 2-609 provides that when "reasonable grounds for insecurity arise," a party may demand adequate assurance of due performance in writing. Failure to provide such assurance within a reasonable time "is a repudiation of the contract." *Accord* RESTATEMENT (SECOND) OF CONTRACTS § 251 (1981).

[701] The board expressed reluctance to rely on National Union Fire Ins. Co., ASBCA No. 34744, 90-1 BCA ¶ 22,266, *aff'd*, 907 F.2d 157 (Fed. Cir. 1991), wherein the ASBCA upheld the government's right to demand adequate assurance in a construction contract case. In *National Union*, the board described the right to demand assurance as a "well recognized example" of the government's ability to exercise other rights and remedies as provided by law, citing *Restatement* § 251 and Salzburg Enters. of Cal., ASBCA No. 29509, 87-2 BCA ¶ 19,761 (supply contract case).

The board concluded that, even if the right to demand assurance applies to construction contracts, the GSA did not reasonably demand assurance, because it was unaware that the contractor still had seven months (rather than three months) to complete the contract.[702]

e. Repudiation Must Be Unequivocal.—In *Engineering & Professional Services, Inc.*,[703] the government demanded assurance that a contractor would complete performance of a contract for satellite communications signal analyzers. The contractor responded that "government financing must be provided to assure contract completion," and that the contract ceiling price "must be raised . . . to ensure adequate funding for delivery . . . ." The board rejected the government's argument that these statements constituted a repudiation of the contract, finding that the statements did not manifest a "positive, unconditional, and unequivocal declaration of fixed purpose not to perform the contract."[704]

3. Contractor Excuses.—

a. Cardinal Change Excuses Contractor's Refusal to Perform.—In *Airprep Technology, Inc. v. United States*,[705] the Department of Energy (DOE) awarded a contract to construct a "baghouse."[706] The specifications provided that an exhaust stream would have an incoming pressure of 0.6 to 1.6 pounds per square inch (psi). After the contractor delivered and installed the baghouse, the DOE demanded assurance that the baghouse would hold an *internal* operating pressure of 0.6 to 1.6 psi. When the contractor refused to give such assurance, the DOE terminated the contract for default.[707] The court overturned the default termination, holding that the contractor's refusal to provide assurance or to perform was excused, because the DOE's interpretation of the specifications constituted a cardinal change to the contract.

b. Performance Excused Due to Legal Impossibility.—In *Soletanche Rodio Nicholson (JV)*,[708] the board determined that construction of a cutoff wall at Beaver Dam was legally, practically, and commercially impossible. At trial, the contractor established that it encountered a Category II differing site condition[709] while excavating rock at the project site (because the rock's compressive strength was significantly greater than the parties expected). The contractor also submitted uncontroverted evidence that it might take up to seventeen years and cost up to $400 million (rather than two years and $17 million) to complete the project using the contractually required method of excavation. Recognizing that the contractor's projections "may be influenced by some degree of hyperbole," the board concluded that the contractor's nonperformance nevertheless was excusable, and converted the default termination to a termination for convenience.[710]

---

[702] *Cf.* Engineering & Professional Servs., Inc., ASBCA No. 39164, 94-2 BCA ¶ 26,762 (insecure party may not demand more than it contractually has the right to receive).

[703] ASBCA No. 39164, 94-2 BCA ¶ 26,762.

[704] *Id.* at 133,139. The board noted that the contractor did not state, "unless and until" the government increases the ceiling price, "we refuse to resume performance." Presumably, such statements would have satisfied the "stringent criteria for repudiation." *Compare* Engineering & Professional Servs., Inc. *with* Betakut USA, Inc. v. General Servs. Admin., GSBCA No. 12512, 94-2 BCA ¶ 26,945 (contractor's statements that it is "not prepared to ship any quantities above the original two year estimate" and "no additional shears are available under terms of this contract" constitute unequivocal statements of repudiation). *See also* A.J.C.A. Constr. v. General Servs. Admin., GSBCA No. 11541, 94-2 BCA ¶ 26,949, where the board found no abandonment, even though the contractor left the jobsite, because the contractor's offer on a proposed modification was pending with the government at the time. The board also concluded that the contractor's failure to respond to a show cause notice "did not warrant termination," because the contractor believed that the government was considering its offer on the modification at the time the show cause notice was issued.

[705] 30 Fed. Cl. 488 (1994).

[706] The court described a baghouse as a pollution control device designed to extract pollutants from an airstream in dry atmosphere. A baghouse is typically placed at the exhaust end of a gas stream.

[707] The contractor asserted that it was incapable of giving that assurance, because the government was misconstruing the specifications, and because its baghouse design made it impossible to build up that level of pressure.

[708] ENG BCA No. 5796, 94-1 BCA ¶ 26,472.

[709] FAR 52.236-2, Differing Site Conditions.

[710] Not only contractors, but government officials, counsel, litigants, and even judges occasionally succumb to the hyperbole temptation. *See, e.g.*, Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989) (majority opinion accuses Justice Kennedy of engaging in "surprising hyperbole"); City of Milwaukee v. Yeutter, 877 F.2d 540 (7th Cir. 1989) ("Hyperbole from opponents must be used with care."); United States v. Snider, 502 F.2d 645 (4th Cir. 1974) (defendant's claiming three billion dependents on tax withholding form described as "hyperbole," conviction overturned); Kilgore Corp. v. United States, 613 F.2d 279 (Ct. Cl. 1979) ("hyperbole posing as expertise"); E.W. Eldridge, Inc., ENG BCA No. 5269-F, 92-1 BCA ¶ 24,626 (hyperbole and emotionalism in EAJA application); Anderson/Donald, Inc., ASBCA No. 31213, 88-3 BCA ¶ 21,140 (hyperbole by government counsel "has been given the lack of consideration it deserves"); Gilroy-Sims Assocs., GSBCA No. 6277, 87-1 BCA ¶ 19,644 ("mere negotiating hyperbole" by Regional Administrator); S.A.F.E. Export Corp., ASBCA No. 29333, 85-3 BCA ¶ 18,404 ("hyperbole and impertinence" found throughout appellant's motion); American Elec., Inc., ASBCA No. 16635, 77-2 BCA ¶ 12,792 (government counsel's brief "may be categorized by two words—intemperate hyperbole"); K & M Constr., ENG BCA No. 2998, 72-1 BCA ¶ 9366 (contractor's affinity for hyperbole tends to "breed disbelief" with respect to his testimony); National Waste Recycling, Inc., B-251608, Apr. 13, 1993, 93-1 CPD ¶ 316 (hyperbole in manufacturer's literature); TDA Joint Venture, B-245361, Jan. 2, 1992 (unpub.) (hyperbole in agency report).

4. Waiver of Delivery Date for First Article Test Report (FATR) also Waives Delivery Date for Production Units.—A contractor did not submit a FATR for air conditioners on the contractually required due date.[711] Rather than send a "show cause" notice immediately,[712] the Army "continued to inquire, seek information, and take action inconsistent with termination."[713] Specifically, the Army made progress payments, requested "motor failure analysis," directed the contractor to rerun certain tests, modified the contract to incorporate engineering change proposals, and witnessed first article tests. The board determined that the Army waived the delivery date for the FATR, and by doing so it also waived the delivery date for the production units.

5. Prospect of Eating Baked Chicken Does Not Justify Sole Source Reprocurement.—In *Al Bosgraaf & Sons, Inc.*,[714] the government default terminated a contract for installation of a deep fat fryer at a Naval Training Center. To avoid delay on the reprocurement, the contracting officer negotiated a modification to an existing renovation contract to complete the job. The modification exceeded the defaulted contract price by over thirty-six percent, and exceeded the next low bidder's price on the defaulted contract by over seventeen percent.[715] The board held that the government failed to act reasonably to mitigate the contractor's damages by not obtaining offers from firms that bid on the terminated contract.[716] The board limited the government's recovery to the difference between the next lowest bid price on the defaulted contract and the defaulted contract price.

E. Terminations for Convenience

1. Revised Rules for Notification of Program Termination.—In 1993, the DOD issued an interim rule requiring military departments and defense agencies to notify contractors of a potential termination of, or substantial reduction in, a defense program.[717] As mandated by the National Defense Authorization Act for FY 1994,[718] the DOD revised this rule to require notification only for a potential termination or substantial reduction of a "major defense program."[719] The contracting officer must notify affected contractors within ninety days of submission of the President's budget or enactment of an appropriations act.[720]

2. Directing Contractor to Reduce Number of Employees to Zero Constitutes Termination.—The United States Postal Service entered a contract requiring the contractor to provide technical and support personnel.[721] Two months prior to the expiration of the contract, the Postal Service directed the contractor to advise its employees that their services were no longer needed.[722] The Postal Service subsequently refused to pay the contractor's claim for administrative expenses and health insurance premiums paid in advance for its discharged employees. The board sustained the contractor's appeal, finding that the Postal Service's direction to the contractor effectively constituted a termination for convenience.

3. Termination for Convenience Recovery.—

a. Contractor May Recover Special Tooling Costs Related to First Article and Production Units.—In *Cape Tool &*

---

[711] Applied Cos., ASBCA No. 43210, 94-2 BCA ¶ 26,837.

[712] FAR 49.402-3(e)(1) provides that if termination for default "appears appropriate, the contracting officer should, if practicable, notify the contractor in writing of the possibility of the termination." The Army eventually issued a Show Cause and Cure Notice 28 days after the FATR due date.

[713] *Applied Cos.*, 94-2 BCA ¶ 26,837, at 133,487.

[714] ASBCA No. 45526, 94-2 BCA ¶ 26,913.

[715] The price negotiated with the renovation contractor was $32,649. The defaulted contract price (as increased to include a more expensive fire extinguisher) was $23,850. The next low bidder's price on the defaulted contract (as increased) was $27,847.

[716] The board helpfully noted that the prospect of feeding the troops baked chicken, instead of fried, was not so serious a consequence as to justify the sole source procurement.

[717] 58 Fed. Reg. 43,285 (1993) (effective Aug. 9, 1993, amending *DFARS* parts 249 and 252 by adding sections 249.7003 and 252.249-7002).

[718] Pub. L. No. 103-160, § 1372, 107 Stat. 1547, 1817-20 (1993).

[719] DFARS 249.7003; 252.249-7002. "Major defense program" is defined as a program that is carried out to produce or acquire a major system. "Substantial reduction" is defined as a reduction of 25% or more in the total dollar value of contracts under the program. *See id.* 252.249-7002(a).

[720] *Id.* 249.7003(b)(2).

[721] Sigma Science Eng'g & Technology Applications Corp., PSBCA No. 3635, 94-3 BCA ¶ 27,211.

[722] The Postal Service relied on a "Method of Recruiting" provision of the contract, which provided that the "number of personnel under contract may be decreased or increased at any time." *Id.* at 135,621.

Die, Inc.,[723] the government terminated for convenience a contract for 124 turn-around assemblies after the contractor had completed two first articles. The contractor sought recovery for two "investment cast molds" which were necessary for both the terminated production units and the first articles, asserting that it was "special tooling."[724] The government denied recovery on the basis of the First Article clause.[725] The board held for the contractor, finding that the contractor's actions in amortizing the costs over the first article and production units was reasonable.[726]

b. Contractor Recovery Not Limited by Termination for Convenience Clause.—In *Montana Refining Co.*,[727] the government terminated for convenience a fuel supply contract after failing to order the guaranteed minimum quantity. The termination for convenience clause relieved the government from liability for unordered quantities, "unless otherwise stated in the contract."[728] The board determined that the contract "otherwise stated" that the government would purchase the minimum quantity, and, therefore, the government was liable for the contractor's damages. The board rejected the government's argument that the *Christian* doctrine[729] limited its liability under the standard termination for convenience clause.[730]

F. Other Remedy Granting Clauses

1. Differing Site Conditions.—

Contractor May Not Create Its Own Differing Site Condition.—When a hazardous materials cleanup contractor intermingled excavated fill, requiring the contractor to perform acidity testing on the soil to distinguish the hazardous from nonhazardous material, it sought recovery for delay and testing costs based on a differing site condition.[731] The contractor based its claim on contract language indicating that the waste was distinguishable based on color. The board found that the soil was distinguishable by color until the contractor intermixed it, and, therefore, denied the claim, barring a recovery for a differing site condition of the contractor's own making.

2. Suspensions of Work.—

Government Held Liable for Third Party's Interference with Contractor's Work.—In *Henderson, Inc.*,[732] the Coast Guard contracted for dredging near Cape Hatteras, North Carolina. When a barge knocked out the only bridge to the island, the state transportation department and the Department of the Interior arranged for ferry service until bridge repairs were complete, but the ferry interfered with the dredging work. When the contractor sought compensation for related delays, the Coast Guard tried to avoid liability in part by asserting that the operation of the ferry was a sovereign act, and that the government therefore was not liable for the delay costs. The board disagreed, however, and found a basis for recovery in a contract provision that defined when the work site would be available to the contractor. The board agreed that the implementation of emergency ferry service amounted to a sovereign act, but it also found that when the contract provides a warranty, the contractor is entitled to relief for its breach, regardless of the cause of the breach.[733]

b. Contractor Recovery Allowed for Delay Claim Supported by After-the-Fact Critical Path Analysis.—A contractor

---

[723] ASBCA No. 46433, 94-3 BCA ¶ ____, 1994 ASBCA LEXIS 203 (Apr. 11, 1994).

[724] *See* FAR 31.205-42(d) (loss of useful value of special tooling is generally allowable as termination cost).

[725] *Id.* 52.209-3, First Article Approval—Contractor Testing (before first article approval, acquisition of materials for balance of contract quantity is at sole risk of contractor, and costs shall not be allocable for termination settlements).

[726] The board noted that the contractor would have had an unbalanced offer if it had allocated the cost of the molds only to the two first articles. *See id.* 15.814 (permitting rejection of materially unbalanced offers).

[727] ASBCA No. 44250, 94-2 BCA ¶ 26,656.

[728] The termination for convenience clause was a *FAR* deviation.

[729] G.L. Christian & Assocs. v. United States, 312 F.2d 418 (Ct. Cl.), *reh. denied*, 320 F.2d 345 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 954 (1964) (court read omitted termination for convenience clause into the contract by operation of law).

[730] *See* FAR 52.249-2, Termination for Convenience of the Government (Fixed-Price). The board in *Montana Refining* found the *Christian* doctrine inapplicable because the contract included an authorized deviation from the standard termination for convenience clause.

[731] Geo-Con, Inc., ENG BCA No. 5749, 94-1 BCA ¶ 26,359.

[732] DOT BCA No. 2423, 94-2 BCA ¶ 26,728.

[733] A dissenting judge would have denied recovery because the "warranty" that the majority found was not express, and because the third-party sovereign that interfered with the contractor's work was not the United States. The dissent would have left the contractor to pursue recovery against the State of North Carolina. *Id.* at 132,995-98. For another recent decision dealing with interference with access to the contractor's work area, *see* Technocratica, ASBCA No. 44134, 94-2 BCA ¶ 26,606 (government responsible for delays caused by denial of access to work site for failure to renew clearances for employees, because the contract did not require new clearances).

must prove that government delay encountered during construction actually affected project completion before it may recover for the delay. Generally this proof is difficult without a critical path schedule or a similar analysis demonstrating causation between the delaying event and late completion of the project.[734] In *Hardrives, Inc.*,[735] however, the board allowed a contractor to recover for government delays, despite a lack of formal critical path scheduling during the construction. Through expert testimony during the litigation of its claim—based on an after-the-fact application of critical path analysis to the project—the contractor succeeded in demonstrating causation between the delaying events and the late project completion, and won its appeal.

3. Liquidated Damages by Another Name?—Generally a construction contract clearly sets forth its liquidated damages provisions, and the parties understand how it allocates the risks of late or other unsatisfactory performance. Another contract clause may serve a similar risk allocation function, however, and be enforceable even if it provides for an adjustment that is quite high, if that clause serves a different purpose than a liquidated damages provision. In *Stapp Towing Co.*,[736] the government had agreed to the inclusion of an "Equipment Ordered but Not Used" clause in a contract for the shipment of diesel fuel. The clause gave the government the right to cancel a shipping order, but required the government to pay $450 per hour for demurrage[737] for equipment committed to the effort by the contractor, if the government cancelled. The government sought to avoid payment of demurrage on cancelled orders, claiming that the charge was in reality a liquidated damages assessment, and that it was so high as to amount to an unenforceable penalty. The board disagreed, however, and found it to be a contractually agreed alternate compensation rate for the contractor's equipment. The board also noted the risks inherent when the parties include compensation provisions in a contract that are not evaluated in the award decision.

4. Variation in Estimated Quantity—Fallout from Foley.—In 1993, the Federal Circuit ended the debate about how to price work outside the allowable variation range of the Variation in Quantity (VEQ) clause[738] by holding that the contract unit price should be the starting point in determining how to price such work, rather than repricing the excess work entirely.[739] In *Labco Construction, Inc.*,[740] the government had attempted to avoid paying the contract unit price for excavation quantities outside the allowable range, by adding an additional line item to the contract under the Changes clause,[741] and by paying a reasonable (but lower) rate for soil excavated under that line item rather than paying the original unit price in the contract. The board found, however, that the contractor was entitled to payment at the original contract rate for excess soil and rock that it excavated, because the VEQ clause is a more specific clause than the Changes clause, and, therefore, governs in overrun situations rather than the more general clause. The board noted that if the government were free to add an additional line item for such additional work, there would be no need for the VEQ clause in its contracts.[742]

5. Permits and Responsibilities.—The Permits and Responsibilities clause[743] sometimes produces harsh results for contractors, causing them to bear unexpected expenses that arise after contract award. In *Hemphill Contracting Co.*,[744] the board mitigated that clause's harshness in a negotiated contract, because the government's negotiator suggested that the contractor use a debris disposal technique (open-air burning) that did not comply with state law. When the government ordered the contractor to use another technique to comply with state environmental requirements, the board allowed the contractor to recover its increased costs, notwithstanding the Permits and Responsibilities clause. The board found that the parties had implicitly included disposal by burning as the contract method of disposal. The board noted that in a sealed bid procurement, the manner of performance is left entirely up to the contractor, but in a negotiated procurement, the manner of

---

[734] *See, e.g.*, Coffey Constr. Co., VABCA No. 3361, 93-2 BCA ¶ 25,788.

[735] IBCA No. 2319, 94-1 BCA ¶ 26,267.

[736] ASBCA No. 41584, 94-1 BCA ¶ 26,465.

[737] Demurrage is payment to a carrier for excess time a contractor spends waiting to load or unload cargo. *Id.* at note 3.

[738] FAR 52.212-11.

[739] *See* Foley Co. v. United States, 11 F.3d 1032 (Fed. Cir. 1993).

[740] AGBCA No. 90-115-1, 94-2 BCA ¶ 26,910.

[741] *See, e.g.*, FAR 52.243-1, Changes—Fixed-Price.

[742] Interestingly, the Corps of Engineers is apparently unhappy with *Foley*, and has requested a *FAR* deviation to allow it to price separately work outside the VEQ clause's allowable variation range, rather than continuing to use the unit prices. *See* 59 Fed. Reg. 44,120 (1994) (point of contact for more information is Patricia Paianton, telephone (202) 272-0961).

[743] FAR 52.236-7.

[744] ENG BCA No. 5698, 94-1 BCA ¶ 26,491.

performance (and the cost paid for it) is affected by the negotiations of the parties. Therefore, this agreement of the parties limited the application of the Permits and Responsibilities clause, and allowed the contractor to recover its increased costs of performance.

G. Value Engineering Changes

1. Federal Circuit Reaffirms Kirlin.—In *M. Bianchi of California v. Perry*,[745] the Federal Circuit reviewed ASBCA decisions denying M. Bianchi of California (Bianchi) royalties based on two value engineering change proposals (VECPs). Bianchi had submitted the proposals to repackage boxes of clothing, but the contracting officer rejected them.[746] Later, the agency accepted VECPs for the same idea from another contractor on a separate contract. Bianchi alleged that the agency's acceptance of the VECPs of the second contractor was "constructive acceptance" of its VECPs, entitling it to royalties. The government conceded at trial that it adopted the same concept as the originally proposed VECPs. Nevertheless, the board denied Bianchi royalties based on the Federal Circuit's decision in *John J. Kirlin, Inc. v. United States*,[747] which prohibits constructive acceptance of VECPs after expiration of the proposer's contract. On appeal, the court reexamined and reaffirmed the *Kirlin* rationale, but remanded the case for an entitlement hearing.[748]

2. . . . And ASBCA Denies Old Claim Based on Kirlin.—The ASBCA also cited *Kirlin* in denying the contractor's claim for royalties in *Amplitronics, Inc.*,[749] wherein the contract for circuit card assemblies did not contain a value engineering clause. The contractor submitted VECPs,[750] but they were all denied. In 1991, the contractor claimed it was entitled to royalties because the agency incorporated its VECPs into contracts since 1987. In rejecting the contractor's claim, the board held that, under *Kirlin*, the contractor could not recover because its contract with the agency had expired long before the alleged constructive acceptance.[751]

3. Modification of Runway Construction Was Not "End Item" for VECP Purposes.—In a contract for runway repair, the contractor proposed VECPs to improve the runway construction process.[752] The contracting officer eventually used the VECPs, but denied the contractor royalties, contending that the deletion of work was a noncompensable "reduction of end items."[753] On appeal, the board held that the "end items" for purposes of the Value Engineering clause were the two runways, not components of their subbase. Because the end items (the runways) were not reduced, the board granted royalties to the contractor.

4. Rejection of VECP Precludes Later Recovery Absent Bad Faith.—In another case involving Bianchi, the ASBCA rejected a claim for royalties based on a VECP for certain stitching on military clothing.[754] Bianchi claimed that the government constructively accepted its previously rejected VECPs by using them on later contracts. However, the board held that once the contracting officer rejected the VECP, the contractor could not recover for its later use unless it showed that the rejection was in bad faith. The board also found that Bianchi failed to establish that the VECP was a change or that it would save costs.

H. Pricing of Adjustments

1. The Eichleay Formula.—

a. Federal Circuit Clarifies the "Stand-By" Requirement.—The Federal Circuit rejuvenated the *Eichleay* formula,[755] just as it appeared to be ailing.[756] In *Interstate General*

[745] 31 F.3d 1163 (Fed. Cir. 1994).

[746] The proposals involved enlarging the boxes so that more clothing could be packed per box.

[747] 827 F.2d 1538 (Fed. Cir. 1987).

[748] The initial hearing before the ASBCA considered quantum only, because the government had conceded the issue of constructive acceptance. On remand, the court directed the ASBCA to determine whether the contractual relationship between the parties had expired prior to the constructive acceptance and whether the contracting officer's initial rejection of the VECPs was in bad faith.

[749] ASBCA No. 44119, 94-1 BCA ¶ 26,520.

[750] The contractor submitted the VECPs contingent on the government incorporating a value engineering clause into the contract as part of the VECPs.

[751] The contractor claimed that the constructive acceptance of the VECPs also meant that the government constructively incorporated the Value Engineering clause.

[752] King Constr. Co., ASBCA No. 38303, 94-1 BCA ¶ 26,434, *aff'd on recon.*, 94-2 BCA ¶ 26,631. The proposals were to leave portions of the runway subgrade undisturbed, thereby reducing time and labor costs.

[753] A "value engineering change proposal" is defined as a proposal that requires a change to the instant contract and results in reducing the overall projected cost to the agency without impairing essential functions or characteristics, but does not include a change in deliverable end items only. FAR 52.248-1.

[754] M. Bianchi of Cal., ASBCA No. 37395, 94-1 BCA ¶ 26,417.

[755] One of the best-known methods for calculating unabsorbed overhead during delays is the *Eichleay* formula. This formula takes its name from a 1960 ASBCA decision, Eichleay Corp., ASBCA No. 5183, 60-2 BCA ¶ 2688, in which the board contemplated how to award the appellant a fair proportion of its home office overhead during a period of government-caused delay.

[756] *See* Contract Law Div. Note, *The Eichleay Formula—Struggling to Survive*, ARMY LAW., Dec. 1993, at 46.

Contractors, Inc. v. West,[757] the court relaxed the requirement that, as a precondition to recovery of unabsorbed overhead, the contractor show that it could not take on other work during a government-caused delay and that its workers were "standing by."[758] In *Interstate General*, the contractor assigned its workers to other contracts during a period of government-caused delay. The ASBCA denied recovery of unabsorbed overhead under *Eichleay* because workers were not on stand-by at the delayed project site.[759] On appeal, the Federal Circuit held that the board misapplied the stand-by requirement. The court concluded that the proper stand-by test focuses not on whether idle workers are physically standing by, but rather on "the delay or suspension of contract performance for an uncertain duration, during which a contractor is required to remain ready to perform."[760]

b. The Eichleay *Formula Is the Exclusive Means of Calculating Unabsorbed Overhead.*—When unabsorbed overhead is at issue, generally the contractor wants to apply the *Eichleay* formula.[761] However, in *Wickham Contracting Co. v. Fischer*,[762] the contractor contended that the *Eichleay* formula underallocated overhead to the delayed government contract, and argued that the court should use the "jury verdict" method.[763] Under *Eichleay*, the delayed contract would have received only a thirty-four percent share of the home office overhead pool. The contractor argued that approximately eighty percent of its home office activity was dedicated to the delayed contract; therefore, that contract should bear an eighty percent share of the home office's expenses. The court refused to apply the jury verdict method, stating that "[w]hen a contractor satisfies the prerequisites for application of the *Eichleay* formula, that formula is the exclusive means available for calculating unabsorbed overhead to the delayed contract."[764]

2. Total Cost Method Preferred over Jury Verdict Method.—Courts and boards use several methods to price contract adjustments. In order of preference, these methods are actual cost,[765] substantiated estimates,[766] total cost,[767] and jury verdict.[768] In a nonprecedential opinion,[769] the Federal Circuit criticized the board's use of a hybrid jury verdict—modified total cost method.[770] The contractor had sought an equitable

[757] 12 F.3d 1053 (Fed. Cir. 1993).

[758] Prior board decisions indicated that the contractor had to demonstrate that it could not have used its workers on other projects and that the workers were "standing by" at the delayed worksite. *See, e.g.*, CS&T Gen. Contrs., Inc., ASBCA No. 43657, 93-3 BCA ¶ 26,003; Decker & Co., GmbH, ASBCA No. 38657, 92-2 BCA ¶ 24,970; Interstate Gen. Gov't Contrs., Inc., ASBCA No. 43369, 92-2 BCA ¶ 24,956; Gaffney Corp., ASBCA No. 36497, 92-1 BCA ¶ 23,811.

[759] ASBCA No. 43369, 92-2 BCA ¶ 24,956.

[760] *Interstate Gen. Contrs.*, 12 F.3d at 1058. *Accord* C & C Plumbing & Heating, ASBCA No. 44270, 94-3 BCA ¶ 27,063.

[761] *See, e.g., Interstate Gen. Contrs.*, 12 F.3d at 1053; Community Heating and Plumbing Co. v. Kelso, 987 F.2d 1575 (Fed. Cir. 1993); CS&T Gen. Contrs., Inc., ASBCA No. 43657, 93-3 BCA ¶ 26,003; Lake Falls Constr., Inc., ASBCA No. 42995, 93-2 BCA ¶ 25,698; Decker & Co., GmbH, ASBCA No. 38657, 92-2 BCA ¶ 24,970; Charles G. Williams Constr., Inc., ASBCA No. 42592, 92-1 BCA ¶ 24,635; Gaffney Corp., ASBCA No. 36497, 91-2 BCA ¶ 23,811.

[762] 12 F.3d 1574 (Fed. Cir. 1994).

[763] Courts and boards may adopt a jury verdict approach when clear proof of injury exists, no more reliable method of calculation exists, and the evidence is sufficient for a fair approximation of the damages. *See, e.g.*, Dawco Constr. Co. v. United States, 930 F.2d 872, 882 (Fed. Cir. 1991); WRB Corp. v. United States, 183 Ct. Cl. 409, 425 (1968); Service Eng'g Co., ASBCA No. 40274, 93-2 BCA ¶ 25,885.

[764] *Wickham*, 12 F.3d at 1580. Although the court's broad language could lead one to conclude that *Eichleay* is the only method for calculating unabsorbed overhead in all types of contracts, the court's decision must be analyzed in the context of the facts of *Wickham*. *Wickham* involved a construction contract, and that the court intended to overrule well-established case law applying other methods in nonconstruction cases is unlikely. *See, e.g.*, Do-Well Mach. Shop, Inc., ASBCA No. 35867, 92-2 BCA ¶ 24,843; Miles Constr., VABCA No. 1674, 84-1 BCA ¶ 16,967, Celesco Indus., ASBCA No. 21932, 81-2 BCA ¶ 15,260; Allegheny Sportswear Co., ASBCA No. 4163, 58-1 BCA ¶ 1684.

[765] Cen-Vi-Ro of Texas, Inc. v. United States, 538 F.2d 348 (Ct. Cl. 1976).

[766] Illinois Constructors Corp., ENG BCA No. 5827, 94-1 BCA ¶ 26,470; Lorentz Brunn Co., GSBCA No. 8504, 88-2 BCA ¶ 20,719; J.M.T. Mach. Co., ASBCA No. 24536, 85-1 BCA ¶ 17,820 (1984), *aff'd*, 826 F.2d 1042 (Fed. Cir. 1987).

[767] David J. Tierney, Jr., Inc., ASBCA No. 7107, 88-2 BCA ¶ 20,806; Concrete Placing Inc. v. United States, 25 Cl. Ct. 369, *aff'd*, 985 F.2d 585 (Fed. Cir. 1992); Servidone Constr. Corp. v. United States, 19 Cl. Ct. 346 (1990), *aff'd* 931 F.2d 860 (Fed. Cir. 1991). When all the preconditions of the total cost method are not present (*e.g.*, the contractor's original bid was unrealistic), reviewing authorities have used a "modified total cost method," which makes adjustments for the unmet preconditions. *See* Servidone Constr. Corp. v. United States, 931 F.2d 860 (Fed. Cir. 1991).

[768] *See* Paragon Energy Corp., ENG BCA No. 5302, 88-3 BCA ¶ 20,959; Joseph Pickard's Sons v. United States, 209 Ct. Cl. 643 (1976); Delco Elecs. Corp. v. United States, 17 Cl. Ct. 302 (1989), *aff'd* 909 F.2d 1495 (Fed. Cir. 1990).

[769] Olsen v. Espy, 26 F.3d 141 (Fed. Cir. 1994).

[770] After using the modified total cost method to calculate the equitable adjustment, the AGBCA applied the jury verdict method to evaluate the realism of the contractor's original bid, and concluded that the contractor was entitled to 25% of the otherwise allowable costs.

adjustment for costs incurred to overcome deficiencies in government-designated borrow pits. The court held that the board erred when it applied the jury verdict method, finding that "the board should have strictly applied the more definitive modified 'total cost' method." The court reasoned that this latter method is particularly appropriate in situations where determining the nature or amount of added work is difficult.

I. Contract Disputes Act (CDA) Litigation.

1. Jurisdiction.

a. Timeliness of Appeal.—The CDA[771] allows contractors ninety days to appeal a contracting officer's final decision.[772] A board of contract appeals may not waive a late filing.[773] In *L.C. Craft*,[774] the appellant's attorney filed an appeal two days after the ninety-day deadline. The attorney asserted that although his client had received the final decision, his client did not understand it or the requirement to take timely action because the contractor was "physically handicapped" and had suffered "two nervous breakdowns." Noting that the attorney provided no other evidence of his client's alleged condition, the ASBCA dismissed the appeal as untimely.

b. Appellate Rights Advisory.—That the government's failure to properly set forth CDA appellate rights in a final decision will toll the time during which a contractor must file an appeal is well established.[775] In *Caesar Construction Co.*,[776] the contractor filed a six-count claim letter more than three years before the appeal. Thereafter, the parties either settled or the contracting officer issued a final decision on each count. However, in the final decision addressing one specific count, the contracting officer failed to inform the contractor of its CDA appellate rights. The board found jurisdiction over this count and allowed the contractor to pursue its claim.

c. Board Without Jurisdiction to Hear Appeal Involving Contractor Status.—In *E. Huttenbauer & Son, Inc.*,[777] the ASBCA held that it lacked jurisdiction over an appeal challenging the government's decision to revoke a contractor's status in the DOD Industrial Preparedness Production (IPP) program. The government's action stemmed from numerous default terminations and other deficiencies indicating contractor performance problems. Specifically electing not to appeal the default terminations, the contractor instead appealed the revocation action. The board declined to assert jurisdiction because the contractor's status in the IPP program affected only future dealings and did not affect any on-going contract.[778]

d. Contract Disputes Act Jurisdiction Found Despite the FDIC's Security Interest in Appellant's Assets.—In *Southwest Construction Corp.*,[779] the government argued that the board lacked jurisdiction because the Federal Deposit Insurance Corporation (FDIC) had taken over appellant's assets, to include any interests arising under the appeal. In essence, the agency argued that this placed the government in the position of suing itself. The board rejected this argument, finding that the appellant was a contracting entity when it filed its claim, when the contracting officer denied the claim, and when it filed its appeal.[780] Further, the board noted that the FDIC had not filed an appearance in the appeal or otherwise communicated with the board. Hence, the board held that the FDIC's subsequent acquisition of a security interest in the contractor's assets, in and of itself, did not negate CDA jurisdiction over the appeal.

e. Contractor's Claim for Storage of Freight Not Covered by the CDA.—Generally, the CDA applies to all express or implied contracts entered into by the federal government except, at the discretion of the agency head, a contract with a foreign government or an international organization.[781] However, under some circumstances, Congress provides a specific

[771] 41 U.S.C. §§ 601-613.

[772] *Id.* § 606.

[773] Cosmic Constr. Co. v. United States, 697 F.2d 1389 (Fed. Cir. 1982), *aff'g* ASBCA No. 26537, 82-1 BCA ¶ 15,541.

[774] ASBCA No. 47351, 94-2 BCA ¶ 26,929.

[775] *See, e.g.*, Pathman Constr. Co. v. United States, 817 F.2d 1573, 1578 (Fed. Cir. 1987).

[776] ASBCA No. 46023, 94-2 BCA ¶ 26,956.

[777] ASBCA No. 40888, 94-2 BCA ¶ 26,907.

[778] *See also* Coastal Corp. v. United States, 713 F.2d 728 (Fed. Cir. 1983) (holding that an implied contract to treat bidders honestly and fairly is not within the CDA's scope).

[779] ENG BCA No. 5286, 94-3 BCA ¶ 27,120.

[780] *See also* 41 U.S.C. § 601(4) (defining "contractor" as "a party to a Government contract other than the Government").

[781] *Id.* § 602(a); FAR 33.203.

statutory vehicle that preempts application of the CDA. In *Northeastern Pennsylvania Shippers Cooperative Ass'n v. United States*,[782] the Military Traffic Management Command (MTMC) awarded a contract for the transport of freight from a DLA warehouse to various points throughout the United States. During contract performance, the contractor stored, at its expense, excess freight discovered in its trucks that was not otherwise listed on a government bill of lading. The contractor would then await instructions from the government as to the disposition of the excess freight. When the government terminated the contract, the contractor filed a CDA claim for costs associated with storing the freight. Declining to grant relief under the CDA, the Court of Federal Claims ruled that the resolution of disputes involving freight and passenger transportation services was controlled by a specific statute[783] preempting application of the CDA.

2. Certification.—

a. Any Attempt at Certification Is Sufficient.—The CDA currently requires contractors to certify all claims in excess of $50,000 before submitting them to a contracting officer.[784] The Federal Courts Administration Act of 1992 (FCAA)[785] eliminated the bulk of litigative gamesmanship associated with challenging the wording of claim certifications.[786] *SAE/Americon—Mid-Atlantic, Inc. v. General Services Administration*,[787] reflected the extent to which the FCAA relaxed the scrutiny applied to CDA certifications. In this case, the appellant submitted a claim seeking, in part, approximately $196,000. Accompanying its claim, the appellant included a "Certificate of Current Cost or Pricing Data."[788] The GSBCA noted that the certificate did not include either the first or third certification prongs required under the CDA.[789] Holding that the "focus under the FCAA is on whether any certification was submitted at all,"[790] the GSBCA ruled that appellant's cost and pricing certification met the minimum CDA jurisdictional requirements.[791]

b. But an Attempt at Certification Must Be Made.—Although the FCAA has greatly relaxed the scrutiny applied to CDA certifications, the contractor must make *some* attempt at certification. Following an analysis similar to that used by the ASBCA,[792] the Court of Federal Claims dismissed a CDA appeal for lack of jurisdiction because the contractor failed to submit any certification, defective or otherwise, with its claim.[793]

3. What Constitutes a Claim?—

a. Contracting Officer's Unreasonable Delay Converts Engineering Change Proposal (ECP) into a CDA Claim.—In a case of first impression, the ASBCA concluded that a contracting officer's failure to timely respond to a contractor's "relatively simple" ECP converted it into a CDA claim.[794] At issue was a contractor's ECP addressing allegedly defective government specifications. Having received no definitive

---

[782] 32 Fed. Cl. 72 (1994).

[783] 31 U.S.C. § 3726.

[784] 41 U.S.C. § 605(a); FAR 33.207. Note, however, that FASA § 2351 increases the claim certification threshold requirement to $100,000. *See supra* note 79 and accompanying text.

[785] Pub. L. No. 102-572, 106 Stat. 4506 (1992).

[786] Specifically, the FCAA provides that defective certification language, in and of itself, does not deprive the board or court of jurisdiction. Faced with a defective certificate, the appropriate tribunal merely shall require the contractor to make the necessary corrections prior to rendering a decision. *Id.* 106 Stat. at 4518.

[787] GSBCA No. 12294, 94-2 BCA ¶ 26,890.

[788] *Federal Acquisition Regulation* 15.804-2 requires certified cost or pricing data for the modification of a non-DOD contract expected to exceed $100,000 (FASA § 1251 increases this threshold to $500,000). *See supra* note 27 and accompanying text.

[789] 41 U.S.C. § 605(c) and *FAR* 33.201 require the contractor to certify that:

> (1) the claim is made in good faith; (2) supporting data are accurate and complete to the best of the contractor's knowledge and belief; and (3) the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.

[790] *SAE/Americon*, 94-2 BCA ¶ 26,890, at 133,852.

[791] In reaching its decision, the board specifically noted a pre-FCAA federal circuit decision which held that the identical certification did *not* pass CDA jurisdictional muster. *See* ReCon Paving, Inc. v. United States, 745 F.2d 34 (Fed. Cir. 1984).

[792] *See* Eurostyle, Inc., ASBCA No. 45934, 94-1 BCA ¶ 26,458 (holding that the *complete* absence of a certification rendered the claim invalid and precluded board from exercising jurisdiction).

[793] Hussam T. Hamza v. United States, 31 Fed. Cl. 315 (1994). In its decision, the court also listed a few "examples of 'technically defective' certifications that may be cured." *Id.* at 323 (citing H.R. REP. NO. 1006, 102d Cong., 2d Sess. 28 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3921, 3937).

[794] S-TRON, ASBCA No. 45890, 94-3 BCA ¶ 26,957.

answer for more than six months after it filed its ECP, the frustrated contractor restyled the ECP as a certified "claim" and requested the contracting officer's final decision. The contracting officer responded by denying the ECP and stating that he was under no obligation to issue a final decision, as no "dispute" existed at the time the contractor submitted its "claim."[795] The contractor subsequently appealed the contracting officer's actions, viewing the failure to issue a final decision as a "deemed denial."[796] Noting that the facts underlying appellant's ECP were "not complex," the ASBCA found the contracting officer's delay in responding to the initial ECP unreasonable and converted the ECP into a claim over which the board could assert jurisdiction.[797]

b. The Dispute Requirement: Can "Nothing" Be a Sum Certain?—The Federal Circuit is again wrestling with the dispute requirement for CDA claims. In *Reflectone, Inc. v. Kelso*,[798] a contractor submitted a request for an equitable adjustment (REA) seeking compensation for costs it attributed to government-caused delays. Before the contractor had calculated its costs, the government asserted it owed the contractor "nothing" for *any* costs associated with the alleged delay. After receiving the REA, with supporting cost calculations, the contracting officer issued a "final decision" denying the REA. On appeal, the Federal Circuit found that the contractor's REA did not constitute a CDA claim.[799] The court held that despite the earlier statements by the Navy denying *any* liability, no "pre-existing dispute" existed over the "sum certain" as it was asserted in the REA.

Referring to this position as "illogical on its face," the dissent[800] pointedly noted that the majority's decision creates what it views as an unnecessary obstacle in the claims submission process.[801] The dissent also argued that the CDA dispute requirement applies only to routine invoices or requests for payment, *not* REAs—stating that "an REA is anything but a 'routine request for payment.'"[802]

The saga continues—on December 5, 1994, the Federal Circuit vacated its decision and granted a rehearing en banc.[803] Stay tuned.

c. An Adjustable "Sum Certain" Is a Proper Claim.—Although perhaps "nothing" may not constitute a sum certain, the amount contained in a contractor's "interim" settlement proposal passes CDA muster. In *Allied-Signal Aerospace Co.*,[804] a contractor submitted an "Interim (Partial)" termination proposal, stating that the specified costs were estimates to be adjusted as actual costs became known. After rejection by the government, the contractor resubmitted its "interim" pro-

---

[795] *See* Dawco Constr., Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991) (holding that a dispute must exist prior to the submission of a proper CDA claim).

[796] *See* 41 U.S.C. § 605(c); FAR 33.211(g) (stating that the failure of a contracting officer to act on a claim within 60 days allows the contractor to treat its claim as "deemed denied").

[797] *S-TRON*, 94-3 BCA ¶ 26,957, at 134,229. The board specifically cited *FAR* 33.201, which states in pertinent part:

> A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount *or it is not acted upon in a reasonable time.*

Id. (emphasis added). *See also* J.A.K. Constr. Co., ASBCA No. 45698, 94-3 BCA ¶ 27,250 (contracting officer's possession of contractor's request for payment for ten weeks, while pending audit, not unreasonable).

[798] 34 F.3d 1031 (Fed. Cir. 1994), *reh'g en banc granted, decision vacated*, 1994 U.S. App. LEXIS 34181 (Fed. Cir. Dec. 5, 1994).

[799] A CDA claim is defined as:

> [A] written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money *in a sum certain*, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.

FAR 33.201 (emphasis added).

[800] Ironically, Judge Michel, the author of the seminal *Dawco* decision on which the majority relied, wrote the dissenting opinion.

[801] *See also* Midland Maint., Inc., ENG BCA No. 6080, 94-3 BCA ¶ 27,215 (board notes that "[a]llowing an over-bureaucratized FAR provision to thwart the CDA's overriding intent to resolve disputes is a step backward").

[802] Interestingly, the ASBCA has repeatedly interpreted *Dawco* exactly opposite from the dissenting opinion's interpretation. In the view of the board, how a contractor styles its submission, as an invoice or an REA, is immaterial; to be a valid CDA claim, it must be preceded by a dispute. *See, e.g.*, Raven Indus., ASBCA No. 44048, 93-3 BCA ¶ 26,031; Saco Defense, ASBCA No. 44792, 93-3 BCA ¶ 26,029; RMS Technologies, Inc., ASBCA No. 44727, 93-2 BCA ¶ 25,789, *recon. denied*, 93-3 BCA ¶ 26,023.

[803] 1994 U.S. App. LEXIS 34181 (Fed. Cir. Dec. 5, 1994).

[804] ASBCA No. 46890, 94-3 BCA ¶ 27,089.

posal as a "claim for payment." Finding jurisdiction, the board ruled that a "claim for a specific amount, based on estimates and subject to adjustment when actual costs become known, is not an improper claim under the CDA."[805]

d. Government's Request for Plant Clearance and Audit Precludes Existence of Dispute.—In *Essex Electro Engineers, Inc.*,[806] the government terminated for convenience its contract with appellant. In its first request for costs, the contractor submitted what it referred to as a certified "claim," including cost information supporting its submission. The contracting officer, following the agency's standard procedures regarding termination proposals, then requested a plant clearance and a DCAA audit of appellant's submission. The contracting officer also noted that the contractor's submission was not yet in dispute. Stating that it had "unqualifiedly abandoned negotiations," the contractor rejected the government's response, asserting that the contracting officer could not "dictate when a claim exists."[807] Finding the contracting officer's request for a plant clearance and a DCAA audit to be reasonable,[808] the board dismissed the appeal on jurisdictional grounds, finding that no pre-existing dispute existed at the time appellant submitted its "claim."

e. Does the Requirement for a Pre-existing Dispute Apply to Termination Settlement Proposals?—The Court of Federal Claims recently offered additional "grist for the CDA disputes mill," addressing in dicta whether a contractor's submission satisfies the *Dawco* dispute requirement.[809] Despite dismissing on jurisdictional grounds an appeal involving costs associated with a termination for convenience,[810] the court gratuitously noted that a properly certified termination settlement proposal submitted pursuant to *FAR* 52.249-2 is a "special type of request for payment," and *not* a "routine request for payment" that otherwise falls within the scope of a CDA claim.[811] Hence, the court observed that the requirement for a pre-existing dispute may well not apply to a termination settlement proposal.

f. Government's Default Termination Necessarily Puts Resulting Request for Costs in Dispute.—In *Boeing Co. v. United States*,[812] the contractor had previously appealed the propriety of the government's default termination decision. After filing its complaint with the court, the contractor submitted two termination for convenience settlement claims to the contracting officer. The contracting officer took no action on the claims, and the contractor subsequently amended its complaint to include the claims, treating them as having been "deemed denied." The government opposed the amendment, asserting that there could be no pre-existing dispute regarding the termination settlement cost claims so long as the propriety of the underlying default termination was still at issue. Characterizing the government's argument as "fickle," the court held that appellant's claims were necessarily in dispute because the "government had denied liability for them through its issuance of a default termination."[813]

4. "It Gets Late Early out There".[814] *Contracting Officer's Final Decision.*—In *KIME Plus, Inc.*,[815] a contracting officer telefaxed her final decision denying contractor's claim to the contractor's project office,[816] advising the contractor that it had ninety days to appeal the contracting officer's action "from the date you receive this decision." On the same day, the contracting officer telephoned the contractor's presi-

---

[805] *Id.* at 134,981.

[806] ASBCA No. 45663, 94-2 BCA ¶ 26,902, *recon. denied*, 94-3 BCA ¶ 27,250.

[807] *Id.* at 133,960. Appellant further alleged that the agency had "a track record . . . of delays for years before any effort is made to resolve terminations for convenience while the contractor is left with financing the Government's debt." *Id.*

[808] *See also* J.A.K. Constr. Co., ASBCA No. 45698, ____ BCA ¶ ____, 1994 WL 589951 (Oct. 21, 1994) (contracting officer's requirement for audit to evaluate contractor's cost submission held to be reasonable).

[809] Alvarado Constr., Inc. v. United States, 32 Fed. Cl. 184 (1994).

[810] The *Alvarado* court dismissed the claim, submitted in 1988, for lack of jurisdiction due to a defective certification. As of October 29, 1992, however, proper certification no longer is a jurisdictional prerequisite. *See* Federal Courts Administration Act of 1992, Title IX, Pub. L. No. 102-572, 106 Stat. 4506, 4518 (1992). The court held that it lacked the equitable authority to extend the remedial language of the FCAA to encompass pre-October 1992 claim submissions.

[811] *See* FAR 33.201.

[812] 31 Fed. Cl. 289 (1994).

[813] *Id.* at 292. The court also noted that the ASBCA's practice of bifurcating the entitlement and quantum portions of appeals involving default terminations was not required by the CDA's disputes clause. Rather, the board's practice reflected its mandate to provide a "swift, inexpensive means of resolving contract disputes." *Id.* at 296.

[814] Yogi Berra *quoted in* 776 STUPIDEST THINGS EVER SAID 195 (1993).

[815] ASBCA No. 46580, 94-3 BCA ¶ 27,128, *recon. denied*, ____ BCA ¶ ____, 1994 WL 590061 (Oct. 24, 1994).

[816] *Federal Acquisition Regulation* 33.211(b) provides that the "contracting officer shall furnish a copy of the decision to the contractor by certified mail, return receipt requested, *or by any other method that provides evidence of receipt.*" (emphasis added).

dent and informed him of her decision, and mailed him a duplicate of the telefaxed decision. The contractor appealed the government's final decision ninety days after receiving the certified mail copy, but more than ninety days after receiving the telefaxed copy. Finding the appeal to be timely, the board held that the government had created "understandable confusion" by failing to specifically indicate which receipt date applied: the telefax transmission date or the date the contractor received the mailed copy of the final decision.[817]

5. Final Decisions and Their Standard of Review.—At issue in *Wilner v. United States*[818] was the evidentiary value of admissions of liability contained in a contracting officer's final decision. Relying on pre-CDA case law that such statements were entitled to a strong presumption of validity,[819] the Court of Federal Claims had considered the contracting officer's final decision as "evidence . . . that must be considered and weighed."[820] On appeal to the Federal Circuit, a three-judge panel had affirmed this judgment.[821]

The Department of Justice asked for a rehearing en banc. The court then vacated the panel decision and reversed the Court of Federal Claims' judgment.[822] Stating that any reliance on case law to the contrary was "misplaced," the court held that the CDA mandated a de novo standard of review which precluded attributing any presumptive evidentiary value to the findings and conclusions of a contracting officer's final decision.[823]

6. Pleadings.—

a. Contractor's Affirmative Defenses Need Not Be Subject of Final Decision.—In its "Answer to the Government's Complaint," an appellant asserted what it described as a "new matter," consisting of allegations that the government's warranty claim was part of a conspiracy to eliminate the contractor as a bidder in future potential contracts.[824] The government responded with a motion to strike, contending that appellant's allegations were not the subject of a contracting officer's final decision. Denying the government's motion, the board viewed the contractor's allegations as affirmative defenses, which do not constitute CDA claims or otherwise require a contracting officer's final decision.

b. Contractor's Assertion of Affirmative Monetary Claims as Part of Defense Against Default Termination Requires Final Decision.—The ASBCA granted a government motion to strike monetary claims in a contractor's complaint that otherwise challenged the government's default termination.[825] The board concluded that the contractor's appeal expanded its defense against the default determination to encompass affirmative monetary claims against the government. The board held that it was without jurisdiction until the contractor submits its monetary claims to the contracting officer and receives a final decision.

7. Discovery.—

a. Nonparty Liable for Costs of Complying with Board Subpoena.—In *Cogefar-Impresit U.S.A., Inc.*,[826] the contractor appealed the government's default termination of a contract to build a detention facility. At the contractor's request, the board issued a subpoena duces tecum to be served on a nonparty architect-engineer (A-E) firm that was responsible for the design drawings of the facility. The A-E firm also provided consultation to both the government and appellant during the ill-fated contract performance period. Additionally, the board noted that the government had notified the A-E firm that it may be liable for delays on the project associated with the contract termination. Despite that it was not a named party, the board concluded that the A-E firm had a "significant nexus" with the events leading to the dispute at issue in the appeal. In light of its deep involvement, the board held that the A-E firm had a duty to "shoulder the burden of costs . . . involved in complying with the subpoena."[827]

---

[817] The board specifically distinguished this appeal from an earlier appeal involving similar circumstances, Tyger Constr. Co., ASBCA No. 36100, 88-3 BCA ¶ 21,149. In *Tyger*, the government specifically stated that the 90-day appeal period started on the date the contractor received the telefax copy of the final decision.

[818] 24 F.3d 1397 (Fed. Cir. 1994).

[819] *See* J.D. Hedin Constr. Co. v. United States, 347 F.2d 235 (Ct. Cl. 1965).

[820] Wilner v. United States, 26 Cl. Ct. 260, 279 (1992).

[821] Wilner v. United States, 994 F.2d 783 (Fed. Cir. 1993).

[822] *Wilner*, 24 F.3d at 1397. Of the eleven judges hearing the case en banc, only the two judges who issued the initial circuit opinion dissented.

[823] The Federal Circuit noted that reliance on the pre-CDA *Hedin* case not only contradicted the clear mandate of the CDA but ran contrary to the court's subsequent decision, Assurance Co. v. United States, 813 F.2d 1202 (Fed. Cir. 1987), interpreting the CDA as requiring a de novo review of final decisions.

[824] E. Huttenbauer & Son, Inc., ASBCA No. 44639, 94-2 BCA ¶ 26,903.

[825] Honig Indus. Diamond Wheel, Inc., ASBCA No. 46875, 94-2 BCA ¶ 26,955.

[826] DOT BCA No. 2721, 94-3 BCA ¶ 27,117, *recon. modified*, 94-3 BCA ¶ 27,183.

[827] *Id.* at 135,157.

8. Attorney's Fees and Costs.—

a. Issue of First Impression Does Not Justify Government's Position.—Despite the appeal involving an issue of first impression, the ASBCA declined to find the government's position substantially justified and awarded appellant its attorney's fees and costs.[828] In the underlying appeal,[829] the ASBCA ruled that the government must pay Prompt Payment Act[830] interest penalties due to the nondelivery of checks stolen by a government-contracted courier. In sustaining the contractor's claim for EAJA fees, the board held that, although the government's position was not "without reason," the legal principals involved in the dispute were not so "new or novel" as to substantially justify its position.[831]

b. Appellant's Subsequent Acceptance of Amount Tendered in Initial Settlement Offer Does Not Preclude Award of EAJA Costs.—At issue in *Grover Enterprises, Inc.*[832] were two claims: one based on an apparent typographical error of an option year unit price,[833] and a claim involving the base year of the contract. The government offered to pay to contractor at the $18,000 unit price if the contractor would withdraw *both* of its claims. The contractor refused. During the ensuing hearing, the government conceded liability on the unit price claim and agreed to pay the $18,000 unit price. The contractor continued to litigate the second claim, which the board subsequently denied. Following the board's decision, the contractor requested EAJA fees and costs incurred in pursuing the unit cost claim. The government argued that, because the amount ultimately paid was equal to that originally offered in the settlement agreement, the contractor was not entitled to recovery. The board disagreed, finding the government's position on this claim so "lacking in both factual and legal support" that the contractor "should not have had to pursue the unit price claim in the first place."[834]

9. Finality of Agency Board Decisions.—The Federal Circuit will review only *final* agency board of contract appeals decisions.[835] A board decision becomes final when the time allowed for seeking reconsideration has lapsed[836] or a party has appealed the board's decision to the Federal Circuit.[837] If an appellant first appeals to the Federal Circuit, the board will not consider a subsequent motion for reconsideration, even though it may otherwise be timely filed.[838] *Nucleus Corp.*[839] presented yet another twist on the subject of finality. In *Nucleus,* the contractor first filed a timely request for reconsideration with the board, and then appealed the board's decision to the Federal Circuit before the board could render a decision on reconsideration. After raising the issue of finality sua sponte, the board concluded that the original decision was not yet final, and, therefore, it had jurisdiction to consider appellant's motion for reconsideration.

10. Miscellaneous.—

a. Ignorance of the "Law" May Be an Excuse: Contractor Successfully Argues It Was Not Aware of Changes in Board Rules.—With the changes mandated by the FASA, all parties must stay abreast of the procedural changes affecting protest and appeal litigation. Nevertheless, a foreshadowing of how the boards may deal with parties lacking a full appreciation of the FASA changes may have been provided in a recent GSBCA decision involving a CDA appeal. The GSBCA recently implemented new procedural rules for both Brooks Act[840] protests and CDA appeals.[841] Among the revisions, the board must *receive* requests for reconsideration not later than

---

[828] Sun Eagle Corp., ASBCA No. 45985, 94-2 BCA ¶ 26,870. At issue was a contractor's claim for fees and other litigation expenses submitted pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504.

[829] Sun Eagle Corp., ASBCA No. 45985, 94-1 BCA ¶ 26,425.

[830] 31 U.S.C. §§ 3901-3906.

[831] 94-2 BCA ¶ 26,870, at 133,699. *See also* ABC Health Care, VABCA No. 3462E, 94-3 BCA ¶ 27,013 (although issue was one of first impression, application of traditional rules of contract interpretation rendered government's position unreasonable).

[832] ASBCA No. 44331, 94-3 BCA ¶ 27,139.

[833] The contractor alleged that, because of a typographical error, its option year unit price was stated as "$1,800" rather than its intended price of $18,000.

[834] *Grover Enterprises*, 94-3 BCA ¶ 27,139, at 135,273.

[835] *See* Dewey Elec. Corp. v. United States, 803 F.2d 650 (Fed. Cir. 1986); Fairchild Republic Co. v. United States, 810 F.2d 1123 (Fed. Cir. 1987); 28 U.S.C. § 1295(a)(10).

[836] For the ASBCA, Board Rule 29 allows parties to file a motion for reconsideration within 30 days of receiving the board's decision.

[837] 28 U.S.C. § 1295 allows parties 120 days to appeal board decisions to the Federal Circuit.

[838] Signal Contracting, Inc., ASBCA No. 44963, 93-3 BCA ¶ 26,058.

[839] ASBCA No. 39612, 94-2 BCA ¶ 26,862.

[840] 40 U.S.C. § 759.

[841] 58 Fed. Reg. 69,246, 69,251 (1993) (effective Jan. 3, 1994).

thirty days after issuance of an appeal decision.[842] In *Adelaide Blomfield Management Co. v. General Services Administration*,[843] the appellant apparently relied on the "old" rules and *mailed* its request within thirty days of the board's original decision. In response to the government's motion to dismiss, appellant contended that it was unaware of the rule change until it received a copy of the new rules after filing its request for reconsideration. Although the board previously had published the new rules in the *Federal Register*,[844] the board agreed to review the request under the old procedure.

b. Frivolous Appeal Merits Sanction Against Contractor and Its Counsel.—In *Dungaree Realty, Inc. v. United States*,[845] the contractor appealed a Court of Federal Claims' decision dismissing its complaint for lack of jurisdiction.[846] The contractor's counsel filed a brief with the Federal Circuit which consisted of a one-sentence argument.[847] Finding appellant's actions to be frivolous, the court assessed sanctions against the contractor and its counsel in an amount equal to double the government's costs.

c. Court of Federal Claims Issues Surprise Decision on A-12 Navy Bomber Dispute.—On December 9, 1994, Judge Robert H. Hodges ruled that the government had improperly terminated for default the Navy's A-12 carrier-based aircraft program.[848] Until this surprise decision was issued, commentators had predicted the litigation surrounding this program would become the costliest federal lawsuit in history.[849] According to news reports, Judge Hodges issued a one-page ruling which stated, in part: "Testimony and other evidence at trial showed that the A-12 contract was not terminated because of contractor default. The contract was terminated because the Office of the Secretary of Defense withdrew support and funding from the A-12."[850] News analysts opined that the decision could cost the government $2.4 billion—$2 billion for the firm's development costs and $400 million for legal costs.[851]

d. ASBCA Appeals Decreased Marginally During FY 1994.—In its annual report of transactions and proceedings, the ASBCA noted that the number of CDA appeals filed in FY 1994 dropped slightly. In FY 1994, the ASBCA docketed 1533 appeals, compared to 1551 in FY 1993. Over the last five Fiscal Years, however, the number of appeals docketed with the board has dropped approximately thirty-one percent. The board report also indicated that the average life[852] of an appeal decided by the board in FY 1994 was 462 days. Finally, of those appeals that either were denied or sustained, the ASBCA sustained 225 appeals (fifty-two percent) and denied 208 appeals (forty-eight percent).

VI. Special Topics

A. Contracting for Information Resources

1. ADPE (Automatic Data Processing Equipment) Cases.—

a. What Is ADPE?—In *Pindar Donnelley Partnership v. Department of Commerce*,[853] the GSBCA once again had an opportunity to define what constitutes ADPE under the Brooks Act.[854] The Patent and Trademark Office (PTO) had a requirement for production of photo composition tapes and

[842] GSBCA R. P. 1(b)(5)(i), 33.

[843] GSBCA No. 11909-R, 94-3 BCA ¶ 27,158.

[844] *See* 58 Fed. Reg. 69,246, 69,251 (1993) (effective Jan. 3, 1994).

[845] 30 F.3d 122 (Fed. Cir. 1994).

[846] The lower court dismissed the complaint because the contractor had not submitted a proper CDA claim to the contracting officer, *Id.*

[847] Appellant provided no citation to the record or legal authority to support its position, but merely stated: "The Court of Federal Claims' decision cannot be sustained since Plaintiff's case lies in contract." *Id.*

[848] McDonnell Douglas Corp. v. United States, No. 91-1204C (Fed. Cl. filed December 9, 1994) (order vacating termination for default).

[849] *See* Andy Pasztor, *Dispute Over A-12 Navy Bomber May be Costliest Federal Suit Ever*, WALL ST. J., July 27, 1994, at B10.

[850] *See* McDonnell Douglas Corp. v. United States, No. 91-1204C (Fed. Cl. Dec. 9, 1994) (order vacating termination for default).

[851] Ralph Vartabedian, *Two Contractors Win Ruling On A-12 Project*, L.A. TIMES, Dec. 10, 1994, pt. D, at 1.

[852] A "life" of an appeal is defined as the number of days from date of docketing to date of decision.

[853] GSBCA No. 12667-P, 94-2 BCA ¶ 26,673.

[854] 40 U.S.C. § 759. Section 10005(f)(3) of the FASA renames the Brooks Act the "Brooks Automatic Data Processing Act." For clarity, this section will use the older term "Brooks Act."

data tapes. The protester claimed that the PTO failed to obtain a required DPA to conduct the procurement.[855] The board examined the solicitation and determined that it focused on entry of computer data onto the tapes. Using the GSA's regulatory guidance,[856] the board held that the data entry requirement made the contract one for Federal Information Processing (FIP)[857] "support services" and that it was subject to the Brooks Act. However, the board also held that the PTO acted properly because the acquisition was within its blanket DPA.[858]

In *Advanced Video Products, Inc.*,[859] the protester challenged a Department of Veterans Affairs acquisition for a "picture archival and communications system" using digitalized photography, arguing that the Department of Veterans Affairs lacked a DPA. The agency contended, however, that the system was a "medical device" and that any use of ADPE was incidental.[860] The board held that the "incidental use" rule did not apply because the system was a "FIP resource."[861] The board also noted that the Brooks Act did not exclude medical FIP resources from its coverage.

b. What Is "Urgent and Compelling"?—Under the Brooks Act, a timely postaward protest creates an automatic stay of procurement action unless the GSBCA finds that "urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Board."[862] In response to a protest of the GSA's award of a contract for support services, the GSA asserted that urgent and compelling circumstances precluded the automatic stay.[863] The board disagreed, finding no urgent and compelling circumstances because the GSA could extend its current contracts[864] and preserve the status quo until the protest was resolved.[865]

c. CBD Notice Not Enough for Losers.—In *Technology Advancement Group, Inc. v. Department of the Navy*,[866] the Navy placed notice of an ADPE contract award in the *CBD*, but did not directly notify the losers of the award. When a firm protested the improper notice, the Navy argued that the *CBD* notice was constructive notice of the award. The board disagreed, holding that no statute existed making a *CBD* notice "constructive notice" to the world. Because a *CBD* notice was required only for contracts subject to the Trade Agreements Act[867] or contracts that likely would result in subcontracts, it was unreasonable to expect offerors to scan the *CBD* for such notices.

2. Restrictive Specification Cases.—

a. Government May Need to Check Computer Catalogs.—In *Integrated Systems Group, Inc. v. NASA*,[868] the

---

[855] Under the Brooks Act, the GSA is the only federal agency authorized to acquire ADPE for the federal government. However, the Act authorizes the Administrator of the GSA to delegate this authority to executive agencies to make ADPE procurements. 40 U.S.C. § 759(b). Without such authority, the agency's actions in procuring ADPE are void. CACI, Inc. v. Stone, 990 F.2d 1233 (Fed. Cir. 1993).

[856] FIRMR, *supra* note 491, 201-2.001.

[857] Federal Information Processing resources is the *FIRMR* term used to describe ADP services.

[858] Under the *FIRMR*, the Administrator of the GSA has issued a blanket delegation of authority to executive agencies to make ADPE acquisitions up to certain levels without prior GSA approval. In this case, the delegation in effect at the time of the solicitation allowed agencies unlimited authority to contract for FIP support services.

[859] GSBCA No. 12848-P, 94-3 BCA ¶ 27,066.

[860] Under the *FIRMR*, contracts that use ADPE on an incidental basis are excluded from Brooks Act coverage. *See* FIRMR, *supra* note 491, 201-39.101-3(a)(2); *FIRMR Bulletin A-1*.

[861] *See* FIRMR, *supra* note 491, 201-4.001. The *FIRMR's* definition of "FIP resources" is the same as the Brooks Act's definition of "ADPE" found in 40 U.S.C. § 759(a)(2).

[862] 40 U.S.C. § 759(f)(3). *But see* FASA *supra* note 1, § 1433 (permitting agencies to continue the procurement process up to contract award, unless the GSBCA determines that this is not in the best interests of the government).

[863] PRC, Inc. v. General Servs. Admin., GSBCA No. 12713-P, 94-2 BCA ¶ 26,663.

[864] The GSA operated under two contracts, one with the new contract awardee under a delivery order for technical support and one with the protester for program management support. The new follow-on contract placed both requirements under one contract.

[865] *See also* Sun Microsystems Fed., Inc. v. Department of the Navy, GSBCA No. 12975-P, 94-2 BCA ¶ 26,881 (rejecting Navy's request for limited suspension of the automatic stay because Navy could not make contract award within 30 days).

[866] GSBCA No. 12709-P, 94-2 BCA ¶ 26,664.

[867] 19 U.S.C. §§ 2501-2582.

[868] GSBCA No. 12603-P, 94-1 BCA ¶ 26,550.

GSBCA declared a NASA specification to upgrade its desktop computers too restrictive. NASA planned to upgrade its Zenith Z-248 (80286 class) computers by issuing solicitations for replacement motherboards[869] capable of using 80386 and 80486 processor chips. However, NASA also wanted the replacements to have ten expansion slots to support internal and external devices. The protester argued that a ten-slot motherboard would be excessive,[870] and the solicitation did not allow offerors to propose complete replacement systems as an alternative. On examining the facts,[871] the board determined that NASA's premise that replacement motherboards were cheaper than replacement systems was "badly flawed." It suggested that NASA should have used a functional specification rather than a design specification to describe its needs, which would have allowed offerors to propose newer systems at a cheaper price and would allow NASA to keep its current Zenith machines for other uses.[872]

b. What Is "Commercially Available"?—In *Syscon Corp. v. Department of the Army*,[873] the Army issued a solicitation for an automatic identification technology system that required that offered products be "commercially available." The protestor claimed that the proposed awardee's products were not commercially available. The board held that under the *DFARS*[874] and the solicitation terms, "commercially available" included commercial items in current production[875] that are available at the time of delivery. Because the awardee's items would be available at time of delivery, award was proper.

c. Same Serial Number Requirement Too Restrictive.—In *ViON Corp.*,[876] the protester challenged a solicitation requiring central processing units used to upgrade a system to have serial numbers identical to those of the units they replace. Although the agency argued that the requirement was necessary to discourage copyright violations,[877] the GAO disagreed, holding that the requirement prohibited vendors from substituting equipment with equipment from different manufacturers and prohibited complete system replacements, rendering the solicitation unduly restrictive.

d. "New Only" Requirement Held Too Restrictive.—In *Coastal Computer Consultants Corp. v. Department of Commerce*,[878] the Bureau of Census issued a delivery order for a new Xerox 4090 laser printing system under a GSA schedule contract. A protester offering refurbished equipment objected, stating that the government's "new only" requirement was overly restrictive. The government asserted, however, that the agency needed the new equipment because it was more reliable. Sustaining the protest, the board found that the agency did not satisfactorily substantiate its conclusion that "new only" was more reliable than refurbished equipment.

e. The GAO Upholds Army "Bundling" Requirement.—In *Tucson Mobilephone, Inc.*,[879] a protester challenged the Army's decision to award one contract encompassing the manufacture and installation of a nontactical radio communications system. The Army argued that bundling both requirements under one contract was important because the coordination between two different contracts would result in an unacceptable amount of "down time" for a critical communications system and would force the Army to inspect and store the equipment prior to installation. The GAO held that the danger of "finger-pointing" between two contractors on a critical communications system provided a reasonable basis for bundling the requirement.

3. Regulatory Changes.—

a. The GSA Amends the FIRMR *to Require Energy-Efficient Computer Equipment.*—In 1993, President Clinton signed Executive Order 12,845,[880] requiring federal agencies

[869] The motherboard is the main printed circuit board in the computer that contains the main processor chip, memory computer chips, and connections to other devices.

[870] Most motherboards made today only have between five and eight expansion slots, which means that the requested motherboards would have to be custom made.

[871] Interestingly, the board did some of its own research of computer prices by referring to the October 1993 issue of *Computer Shopper* magazine to determine current computer prices.

[872] The board suggested that NASA could use the computers for other purposes in the agency or dispose of the computers on the open market.

[873] GSBCA No. 12803-P, 94-3 BCA ¶ 27,007.

[874] Under *DFARS* 211.7001(a)(3), commercial items include items not manufactured specifically for the government which are not yet available in the commercial marketplace, but will be available for commercial delivery in a reasonable period of time.

[875] The solicitation defined "current production" to exclude prototype, out-of-date, discontinued, or developmental equipment.

[876] B-256363, June 15, 1994, 94-1 CPD ¶ 373.

[877] The agency wanted the ability to trace back to the original unit any "pirated" computer software.

[878] GSBCA No. 12869-P, 94-3 BCA ¶ 27,151.

[879] B-256802, July 27, 1994, 94-2 CPD ¶ 45.

[880] 58 Fed. Reg. 21,887 (1993).

to purchase microcomputers that meet the EPA's "Energy Star" guidelines for energy efficiency. The GSA has amended the *FIRMR* to comply with that order.[881]

b. The GSA Increases Agency Delegations of Procurement Authority.—The GSA has increased agencies' authority to acquire ADPE without prior GSA approval.[882] Under the new delegation, the GSA abandoned its uniform delegation of procurement authority for all agencies based on type of FIP resource[883] and adopted a three-tier approach based on the size of the agencies' ADPE budgets and the total FIP resources acquired under the contract. Under the new system, larger agencies (DOD (including the military departments), Energy, Health and Human Services, Transportation, Treasury, and NASA) received an increased delegation to twenty million dollars. Medium-sized agencies (Agriculture, Commerce, the EPA, the GSA, Interior, Justice, State, and Veterans Affairs) received an increased delegation to ten million dollars, while all other agencies received an increase to five million dollars. However, the new delegations are based on the total FIP resources acquired under the contract, not the individual type of FIP resource involved.[884]

c. Miscellaneous Changes.—The GSA made several miscellaneous changes to the *FIRMR*, including: changing the definition of "performance validation" to allow other testing methods besides benchmarking; requiring agencies to designate to the GSA the agency official authorized to submit agency DPAs; clarifying the applicability of blanket DPAs to procurements under the 8(a) program; requiring agencies to use the FTS 2000 network for long distance telecommunications within the United States, Guam, Puerto Rico, and the Virgin Islands unless the GSA grants an exception; removing the mandatory requirement to use purchase of telecommunications systems (POTS) contracts; and revising the content of protest notices to GSA.[885]

d. Proposed Rules.—The GSA has proposed to amend the *FIRMR* to exclude predominately non-FIP resource acquisitions from *FIRMR* coverage where the FIP resource component of the contract is less than $500,000. The proposed amendment also would require agencies to use *OMB Circular A-94* to calculate present value in making source selections, and would reference *FIRMR Bulletin A-1* as guidance on determining *FIRMR* applicability.[886]

The DOD has proposed complex amendments to *DFARS* parts 211, 227, and 252 to prescribe new technical data regulations. The proposed amendments create a new subpart concerning computer software and the various forms of government rights therein. Additionally, the proposal clarifies the rights of the government and the contractor concerning technical data paid for with a mixture of government and private funds.[887]

B. Fraud

1. Criminal Cases.—

a. Large Civil Judgment Following Criminal Conviction Not Barred by Double Jeopardy Clause.—In *United States v. Barnette*,[888] the Eleventh Circuit considered whether a potential civil recovery following a criminal conviction would violate the double jeopardy clause of the United States Constitution.[889] A district court convicted Barnette on multiple counts of defrauding the government.[890] As part of his sentence, the court ordered Barnette to pay seven million dollars as restitution. Following the criminal conviction, the government filed a civil action asserting claims under various statutes, including the False Claims Act (FCA).[891] The government sought civil damages in an amount between $18 million and $50.5 million, depending on the theory of recovery. Barnette argued that the imposition of such a large civil recov-

---

[881] 59 Fed. Reg. 952 (1994) (effective Jan. 7, 1994, amending *FIRMR* parts 201-17 and 201-20).

[882] 59 Fed. Reg. 53,360 (1994) (effective Oct. 24, 1994, amending *FIRMR* part 201-20).

[883] FIRMR, *supra* note 491, 201-20.305-1 (1991). Under the uniform system, all federal agencies were able to acquire up to $2.5 million of individual ADPE/FIP resources without GSA approval. Therefore, a contract for two million dollars of hardware and one million dollars of software required no prior approval, because the value of each type of FIP resource (hardware, software) was under the threshold.

[884] For example, if the DOD wishes to buy $18 million worth of hardware and $4 million dollars of software in a single contract, it must obtain prior approval from the GSA for the procurement. Although each type of FIP resource is under the DOD blanket delegation threshold, the total value of all FIP resources under the proposed contract ($22 million in this case) exceeds the threshold.

[885] 59 Fed. Reg. 61,281 (effective Dec. 30, 1994, amending various sections of 41 C.F.R. pt. 201).

[886] 59 Fed. Reg. 39 (1994).

[887] 59 Fed. Reg. 31,584 (1994).

[888] 10 F.3d 1553 (11th Cir.), *cert. denied*, 115 S. Ct. 74 (1994).

[889] U.S. CONST. amend. V.

[890] For a history of the criminal proceedings against Barnette, *see* United States v. Barnette, 800 F.2d 1558 (11th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987).

[891] 31 U.S.C. § 3729.

ery would violate the Fifth Amendment protection against double jeopardy.[892] The circuit court held that, if the government could prove its direct loss was approximately $16 million, a civil recovery of $50.5 million would not lack a "rational relation to the government's loss" and would, therefore, be constitutional.[893] The court remanded the case for a determination of the government's actual loss.

b. Each Invoice May Be Charged as Separate Offense Under Major Fraud Act.—A federal district court[894] ruled that the government may charge each fraudulent invoice as a separate count under the Major Fraud Act.[895] The defendant, a vice president of Grumman Data Systems Corporation, allegedly overcharged the government for the cost of money used to finance a contract. The government charged eleven counts of violating the statute, one for each fraudulent invoice the defendant submitted. The defendant argued that charging eleven counts was multiplicious. The court disagreed, holding that the submission of each invoice constitutes a separate violation. The court noted that the statute provides for a maximum fine of ten million dollars for any prosecution thereunder, including a prosecution with multiple counts.[896]

c. Corporate Defendant May Be Convicted of Conspiracy Despite Acquittal of Employee Codefendant.—Hughes Aircraft Company (Hughes) and one of its employees were charged with one count of conspiracy to defraud and make false statements against the United States,[897] and two counts of making false statements.[898] Although the employee was acquitted on all counts, Hughes was convicted on the conspiracy charge.[899] On appeal,[900] Hughes raised several creative arguments challenging its conviction. Rejecting all of Hughes's arguments, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) held that the conviction of a conspirator may be valid despite the acquittal of all coconspirators.

2. Civil Cases.—

a. Government Entitled to Damages Under FCA for Early Progress Payments.—In *Young-Montenay, Inc. v. United States*,[901] the Federal Circuit rejected a contractor's argument that the government suffered no actual damages by making progress payments to the contractor before it was entitled to receive them.[902] The contractor added $49,000 to the cost of items purchased from a subcontractor, and submitted an invoice for the inflated amount.[903] The court held that the contractor's fraud damaged the government in two ways. First, the government was denied the use of the overpaid money. Second, the contractor had less incentive to complete the project on time after receiving the early payment. The court affirmed the trial court's award of $147,000 in damages.

b. 8(a) Contractor's Misrepresentation of Status Warrants FCA Liability and Forfeiture of Claims.—After obtaining a subcontract with the SBA under section 8(a) of the Small Business Act,[904] AB-Tech Construction, Inc., (AB-Tech) entered into a series of agreements with Pyramid Construction Co. (Pyramid), a nonminority owned firm, without obtaining SBA approval.[905] After contract completion, AB-Tech filed a claim against the government for increased costs due to defective specifications. Based on the undisclosed agreements between AB-Tech and Pyramid, the government filed counterclaims under the FCA[906] and the forfeiture

[892] U.S. CONST. amend V; United States v. Halper, 490 U.S. 435 (1989) (holding that a civil penalty must bear a rational relation to the goal of compensating the government for its loss).

[893] *Barnette*, 10 F.3d at 1560 (quoting United States v. Mayers, 897 F.2d 1126 (11th Cir.), *cert. denied*, 498 U.S. 865 (1990)).

[894] United States v. Broderson, No. CR93-1177(JM), 1994 U.S. Dist. LEXIS 12982 (E.D. N.Y. Apr. 1, 1994).

[895] 18 U.S.C. § 1031.

[896] *See id.* § 1031(c).

[897] *Id.* § 371.

[898] *Id.* § 1001.

[899] Hughes was acquitted on the other two counts.

[900] United States v. Hughes Aircraft Co., 20 F.3d 974 (9th Cir. 1994).

[901] 15 F.3d 1040 (Fed. Cir. 1994).

[902] The FCA provides for civil penalties of $5000 to $10,000 plus three times the amount of damages sustained by the government. 31 U.S.C. § 3729.

[903] The contractor later paid its subcontractor the additional $49,000. *See Young-Montenay*, 15 F.3d at 1041.

[904] 15 U.S.C. § 637.

[905] Regulations governing the 8(a) program state that one basis for termination from the program is the "[f]ailure of the [small business] concern to obtain prior SBA approval of any management agreement or other agreement relative to the performance of a section 8(a) contract." 13 C.F.R. § 124.209(a)(16) (1994).

[906] 31 U.S.C. §§ 3729-3733.

statute.[907] On appeal,[908] the court held that each progress payment request AB-Tech submitted while performing the contract was a separate violation of the FCA. The court reasoned that by deliberately concealing the agreements from the SBA, AB-Tech "caused the government to pay out funds in the mistaken belief that it was furthering the goals of the 8(a) program.[909] The court awarded the government the maximum statutory penalty ($10,000) for each of the twenty-one progress payment requests that AB-Tech submitted. However, the court denied the government's request for treble damages, finding that the government had not shown any detriment to its contract interests.[910] The court also granted the government's counterclaim under the forfeiture statute. Finding that "28 U.S.C. § 2514 requires the forfeiture of all claims arising under a contract tainted by fraud against the government,"[911] the court dismissed AB-Tech's complaint with prejudice.

c. Board's Findings Collaterally Estop Government from Relitigating Issues in FCA Suit.—An agency terminated a contract for convenience, disallowing a substantial portion of the contractor's claimed cost of performance. On appeal, the government argued that the contractor had fraudulently overstated its claimed progress and omitted information which would have given the government grounds to terminate the contract for default.[912] The board suspended proceedings to allow the government to investigate criminal fraud charges against the contractor. However, rather than file criminal charges, the government filed a civil action under the FCA. Declining to suspend its proceedings until the end of the civil suit, the board overturned the government's cost disallowance, finding that the contractor's requests for payment had identified the specific types of costs the government now sought to disallow. Following the board's decision, the contractor moved for summary judgment in the government's FCA suit. The district court granted the contractor's motion on the grounds of collateral estoppel, and the government appealed. In *United States v. TDC Management Corp.*,[913] the District of Columbia Circuit held that the board's findings regarding the information contained in the payment requests collaterally estopped the government from relitigating the issue in its FCA suit. Because the board had not determined whether the contractor had omitted information from its request, however, the court concluded that the government could pursue an FCA claim based on these omissions.

3. Qui Tam *Cases.*—

a. Constitutionality.—Last year, we reported the Ninth Circuit decision upholding the constitutionality of *qui tam* actions.[914] In 1994, the Supreme Court denied a petition for certiorari seeking review of that decision.[915] The Washington Legal Foundation, the Aerospace Industries Association, Northrop Corporation, Litton Industries, Rockwell International Corporation, and the Blue Cross and Blue Shield Association all had filed amicus briefs urging the court to grant review.

b. Former Inspector General Employee Not Barred as Relator.—In *United States ex rel. Fine v. MK-Ferguson Co.*,[916] the court held that a former Department of Energy (DOE) Inspector General (IG) employee could be a *qui tam* relator. The court found that the list of persons excluded by the *qui tam* provisions of the FCA[917] did not include IG employees, and declined to read such a restriction into the statute. The court further held that mere preparation of an audit report was not "public disclosure" as defined by the FCA,[918] because "public disclosure" required some affirmative act on the part of the government to disclose the information to the public. Nevertheless, the DOE IG's forwarding a copy of its audit report to the State of Oregon constituted a public disclosure. Accordingly, the court lacked jurisdiction

---

[907] 28 U.S.C. § 2514.

[908] AB-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429 (1994).

[909] *Id.* at 434.

[910] The court stated that the "[g]overnment got essentially what it paid for—[a building] built in accordance with the contract drawings and specifications. *Id.*

[911] *Id.* at 436.

[912] TDC Mgmt. Corp., DOTBCA No. 1802, 91-2 BCA ¶ 23,815, *aff'd on recon.*, 93-1 BCA ¶ 24,061, *aff'd sub nom.* Skinner v. TDC Mgmt. Corp., 975 F.2d 869 (Fed. Cir. 1992).

[913] 24 F.3d 292 (D.C. Cir. 1994).

[914] *See 1993 Contract Law Developments—The Year in Review*, ARMY LAW., Feb. 1994, at 65 (discussing United States ex rel. Kelly v. Boeing Co., 9 F.3d 743 (9th Cir. 1993)).

[915] United States ex rel. Kelly v. Boeing Co., 9 F.3d 743 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994).

[916] 861 F. Supp. 1544 (D. N.M. 1994).

[917] *See* 31 U.S.C. § 3730(e).

[918] *See id.* § 3730(e)(4)(A).

over those counts of the relator's complaint based on the DOE IG audit.[919]

The Ninth Circuit recently decided a consolidated appeal of two other cases involving the same relator and nearly identical facts.[920] Following the district court's reasoning in *MK-Ferguson,* the court held that former IG employees are not per se barred from being *qui tam* relators. Further, the relator in these cases was an original source; his review of audit sheets and other financial records, rather than the publicly disclosed audit reports, formed the basis for his allegations.

c. In-house Counsel May Be Relator Against Former Employer.—Faced with what it termed a "novel question," a federal district court held that a former in-house counsel may be a *qui tam* relator against his former employer.[921] The court found that the FCA did not exclude lawyers from the universe of persons who could be *qui tam* relators.[922] Nevertheless, the court found that the FCA did not preempt state law governing a lawyer's ethical obligations. Because state law prohibited the lawyer from disclosing client confidences, and these confidences formed the entire basis for the *qui tam* complaint, the relator had no grounds on which to base his complaint.

d. Death of Relator Does Not Let Contractor off the Hook.—Considering "an issue of first impression in the federal appellate courts," the Eleventh Circuit held that a *qui tam* suit survives the death of the relator.[923] The court applied a three-part test established by the United States Court of Appeals for the Fifth Circuit[924] (Fifth Circuit) to determine that the FCA was remedial, rather than penal, in nature. Because remedial actions survive the death of the plaintiff, the court allowed the substitution of a personal representative for the deceased relator.

e. Fourth Circuit Weighs in on Meaning of Qui Tam *Provisions.*—Scientific Supply, Inc., (SSI) was a distributor of health care products manufactured by Becton Dickinson & Company (BD). After BD canceled its distributorship agreement, SSI filed suit alleging that BD canceled the agreement out of fear that SSI would disclose that BD was overcharging the government. BD settled the suit with SSI, and the parties agreed to keep the terms of the settlement confidential. One year later, an SSI employee brought a *qui tam* action against BD. The government intervened twenty-one months later. The district court dismissed the government as a party because the government had failed to meet the sixty-day statutory deadline for intervening.[925] The district court also dismissed the relator's complaint because it was based on the prior public disclosure of allegations against BD in the SSI lawsuit. In *United States ex rel. Siller v. Becton Dickinson & Co.,*[926] the Fourth Circuit reversed both findings. After a lengthy analysis, the court determined that the sixty-day period was not jurisdictional.[927] The court also held that the dismissal of the relator's complaint was proper only if: (1) the complaint was based on the allegations in the SSI suit; (2) the SSI suit was a public disclosure in a civil hearing; and (3) the relator was not an original source. Finding that the term "based upon" means "derived from,"[928] the court remanded the case to the district court to determine whether the relator had obtained the information on which his allegations were derived from the SSI suit or an independent source. In reaching this holding, the court explicitly rejected precedent from the Second, Tenth, and District of Columbia Circuits.

The Fourth Circuit also disagreed with the district court's finding that the relator was not an original source, holding that the statute requires only that a relator have direct and independent knowledge of the basis for his allegations, and that he provide this information to the government before instituting his *qui tam* action.[929] Despite the Fourth Circuit's emphasizing that its decision would create a split among the circuits, the Supreme Court rejected BD's petition for certiorari.[930]

[919] The relator did not qualify for the original source exception to the statute's jurisdictional bar because he did not conduct the investigations that led to the allegations disclosed in the audit report. *See id.*

[920] United States ex rel. Fine v. Chevron U.S.A., Inc., 39 F.3d 957 (9th Cir. 1994).

[921] United States ex rel. John Doe v. X Corp., 862 F. Supp. 1502 (E.D. Va. 1994).

[922] *See* 31 U.S.C. § 3730(e).

[923] United States ex rel. Neher v. NEC Corp., 11 F.3d 136 (11th Cir. 1994).

[924] *See* In re Wood, 643 F.2d 188 (5th Cir. 1980).

[925] *See* 31 U.S.C. § 3730(b)(4).

[926] 21 F.3d 1339 (4th Cir.), *cert. denied,* 115 S. Ct. 316 (1994).

[927] The court noted that this issue was "a question of first impression in this, or any other, federal circuit." *Id.* at 1342.

[928] *Id.* at 1348. 31 U.S.C. § 3730(e)(4)(A) provides that a court does not have jurisdiction over an action "based upon" the "public disclosure" of allegations or transactions under certain circumstances.

[929] *See* 31 U.S.C. § 3730(e)(4)(B). The court noted that the district court had relied on decisions from the Second and Ninth Circuits which hold that to be an original source, a *qui tam* relator must not only have direct and independent knowledge of the basis for his allegations, but also must have been a source to the entity that publicly disclosed the information. Under this standard, the relator would have to have been a source to SSI, which publicly disclosed the information in its lawsuit.

[930] United States ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339 (4th Cir.), *cert. denied,* 115 S. Ct. 316 (1994).

f. Government Does Not Have Absolute Right to Bar Qui Tam *Settlement.*—In *U.S. ex rel. Killingsworth v. Northrop Corp.*,[931] the Ninth Circuit clarified the scope of the government's right to object to a *qui tam* settlement. The government initially declined to exercise its right to intervene in the action.[932] However, when the parties proposed a settlement agreement, the government objected and asked the district court to allow it to intervene for purposes of opposing the settlement.[933] The district court denied the government's motion and dismissed the action with prejudice. On appeal, the Ninth Circuit held that the government has no absolute right to bar a settlement once it elects not to intervene in an action. However, the government does have the right to object to a settlement for good cause, and the right to have a hearing on the issue. The court remanded the case to the district court for such a hearing.[934]

g. Fifth Circuit Rules on Scope of Whistleblower Protection.—The *qui tam* provisions of the FCA prohibit the discharge of any employee who assists in or brings a *qui tam* action.[935] In *Robertson v. Bell Helicopter Textron, Inc.*,[936] the plaintiff alleged that Bell fired him because he had conducted an investigation with a view towards filing a *qui tam* action. Bell maintained, however, that the plaintiff was discharged because he had a low performance rating. The Fifth Circuit held that a whistleblower must show that the employer knew that the employee engaged in protected activity. The court found that, because plaintiff never used the words "illegal," "unlawful," or "*qui tam*" when voicing his concerns to superiors, Bell had no reason to know that he was engaging in protected activity. Additionally, Bell had no reason to know of the plaintiff's investigation because, as the plaintiff himself admitted, his investigation was limited to his routine duties as a contract administrator.

4. The GSBCA Dismisses Claim Involving Fraud.—In *P.H. Mechanical Corp. v. General Services Administration*,[937] a contractor pursued its quantum claim despite pleading guilty to one count of violating the FCA[938] for fraudulently inflating the amount of the claim.[939] The GSBCA noted that this was a case of first impression, stating, "[n]ever before has an appellant convicted of fraud returned to this Board to request further compensation on the very claim underlying its conviction."[940] The board quickly disposed of the appeal, holding that the contractor was collaterally estopped from denying the fraud because of the criminal convictions. Because the claim involved fraud, the board lacked jurisdiction under the CDA.[941]

C. Suspension and Debarment

1. Proposed Debarment During Part of Solicitation Period Does Not Bar Protester from Pursuing Protest.—In *Integrated Systems Group, Inc. v. Department of the Navy*,[942] the Navy issued an RFQ for computer equipment. Although the Army proposed it for debarment, Integrated Systems Group (ISG) submitted a proposal to the Navy. Before the Navy awarded a contract, the Army withdrew its proposed debarment. The GSBCA rejected the Navy's argument that the protester was estopped from challenging the conduct of the procurement merely because the protester was proposed for debarment during a portion the procurement period. The board first noted that ISG had not made any false representations to the Navy.[943] The board also stated that, while the contracting

---

[931] 25 F.3d 715 (9th Cir. 1994).

[932] *See* 31 U.S.C. § 3730(b)(2).

[933] The parties had structured the settlement so that the bulk of the money went to the relator's wrongful termination claim, rather than his *qui tam* claim, even though it appeared that the wrongful termination claim was barred by a statute of limitations. Under 31 U.S.C. § 3730(d)(2), the government would be entitled to at least 70% of any amount the relator recovered for his *qui tam* claim. However, the government would not be entitled to any portion of his recovery on the wrongful termination claim.

[934] The court stated that if the district court determined the proposed settlement was a fair allocation of funds, it could dismiss the action; if not, it could disapprove the settlement.

[935] *See* 31 U.S.C. § 3730(h).

[936] 32 F.3d 948 (5th Cir. 1994).

[937] GSBCA No. 10567, Feb. 28, 1994, 94-2 BCA ¶ 26,785.

[938] 18 U.S.C. § 287.

[939] The contractor prevailed in a previous entitlement hearing before the board.

[940] *P.H. Mechanical Corp.*, 94-2 BCA ¶ 26,785, at 133,209.

[941] *See* 41 U.S.C. § 605(a).

[942] GSBCA No. 12784-P, 94-3 BCA ¶ 26,967.

[943] Apparently, the RFQ did not require offerors to make any certification regarding debarment, proposed debarment, or suspension. *See id.* at 134,314.

officer should not have considered ISG's quotation while ISG was proposed for debarment,[944] the contracting officer was unaware of ISG's status. Once the Army withdrew ISG's proposed debarment, prior to award, the contracting officer was free to consider ISG's proposal.[945]

2. The DOD Publishes Uniform Suspension and Debarment Procedures.—The DOD amended the *DFARS* to include uniform suspension and debarment procedures.[946] These new procedures are similar to those which the Army has used. All DOD debarring and suspending officials must follow the new procedures.

3. False "Made in America" Labels, Unfair Trade Practices Added to List of Causes for Debarment, Suspension.—In accordance with sections 201 and 202 of the Defense Production Act,[947] the CAA and DAR Councils published interim rules adding fraudulent use of "Made in America" labels, and commission of unfair trade practices, to the list of causes for debarment or suspension.[948] The rules define "unfair trade practices" to include the making of a "knowingly false statement regarding a material element of a certification concerning the foreign content of an item of supply. . . ."[949] The rules further provide as a cause for debarment "[i]ntentionally affixing a label bearing a 'Made in America' inscription . . . to a product sold in or shipped to the United States, when the product was not made in the United States."[950]

The DAR Council also published a final rule adding fraudulent use of "Made in America" labels to the lists of causes for debarment and suspension in the *DFARS*.[951] The rule also deleted *DFARS* 209.406-4, which had mandated a three-to-five-year debarment period for an entity debarred based on a conviction for fraudulent use of a "Made in America" label.[952]

D. Ethics

1. Conflicts of Interest.—

a. Mere Employment of Former Government Official Not Sufficient to Disqualify Competitor.—In *ITT Federal Services Corp.*,[953] the GAO denied a protest alleging that the agency should have disqualified the contract awardee from the competition due to a conflict of interest. The protester, an incumbent contractor for Directorate of Logistics functions at Fort Leonard Wood, Missouri, noted that a former government employee, who had been a Logistics branch chief, worked for the awardee following his retirement from government service. As a government employee, this individual helped prepare initial drafts of the performance work statement (PWS).[954] He also had access to some of the protester's proprietary information. The GAO stated,

> The mere employment of an individual who is familiar with the type of work required and helped prepare the specification or statement of work, but who is not privy to the contents of proposals or other inside information, does not establish a conflict of interest or confer an unfair competitive advantage.[955]

Noting that the protester had failed to establish that the individual had access to such information, or that he had disclosed any "inside" information to which he did have access as a government employee, the GAO found that the protester's assertions amounted to mere speculation.

---

[944] *See* FAR 9.405(d)(3).

[945] The *FAR* permits the contracting officer to consider a proposal from an ineligible contractor who becomes eligible prior to award. *See* FAR 9.405(d)(3); *see also* Auto-X, Inc., B-238046.2, June 6, 1990, 90-1 CPD ¶ 532.

[946] DAC 91-6, 59 Fed. Reg. 27,662 (1994) (effective May 27, 1994, adding *DFARS* 209.402 and *DFARS* appendix H).

[947] Pub. L. No. 102-558, §§ 201, 202, 106 Stat. 4198, 4220 (1992).

[948] FAC 90-20, 59 Fed. Reg. 11,371 (1994) (effective Mar. 10, 1994, amending *FAR* 9.403, 9.406, and 9.407-2).

[949] FAR 9.403.

[950] *Id.* 9.406-2(a)(4).

[951] DAC 91-6, 59 Fed. Reg. 27,662 (1994) (effective May 27, 1994, adding *DFARS* 209.406-2 and deleting *DFARS* 209.406-4).

[952] *Id.* The statutory mandate to specify the debarment period for such action was discontinued. *See* Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, 107 Stat. 1418 (1993).

[953] B-253740.2, May 27, 1994, 94-2 CPD ¶ 30.

[954] This activity made the individual a procurement official as defined in the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. § 423 [hereinafter Procurement Integrity Act]. *See* FAR 3.104-4(h)(1). However, his activities related to the procurement, and his retirement from government service had occurred during the period when Congress had suspended the postemployment restrictions of the Procurement Integrity Act (December 1, 1989 through May 31, 1991). *See* 41 U.S.C. § 423(f); FAR 3.104-3. Therefore, this individual was not prohibited from assisting the awardee in obtaining the contract.

[955] *ITT Fed. Servs. Corp.*, 94-2 CPD ¶ 30, at 7.

b. Even the Disclosure of Significant Information May Not Disqualify a Competitor.—In *Textron Marine Systems*,[956] the GAO considered another case in which a former government employee helped his new employer obtain a contract. The protest involved the activities of a Mr. David C. Braa, who was the alternate contracting officer's technical representative for a service support contract performed by Textron Marine Services (TMS). In this capacity, Mr. Braa reviewed numerous TMS cost proposals containing, in part, TMS rates for each category of cost. He also participated in drafting the statement of work (SOW) for the follow-on contract which became the subject of the protest. Mr. Braa approved a TMS cost proposal the day before he signed an employment agreement with Resource Consultants, Inc. (RCI).[957] While employed by RCI, Mr. Braa acted as its proposal manager and helped prepare RCI's technical proposal. The proposal named Mr. Braa as RCI's project manager for the contract.

TMS first argued that Mr. Braa had violated the conflict of interest statute.[958] The GAO disposed of this issue by stating that the allegation was outside the purview of its bid protest regulations.[959] TMS also argued that Mr. Braa had violated the employment discussion provisions of the Procurement Integrity Act[960] and had disclosed proprietary information which gave RCI an unfair competitive advantage. The GAO first held that there was no evidence that Mr. Braa disclosed the proprietary cost information to which he had access as a government employee. Other information which Mr. Braa did provide to RCI was either based on his opinion or was otherwise readily available. Employing a very restrictive reading of the term "personal and substantial participation," the GAO found that Mr. Braa's participation in drafting the SOW did not make him a procurement official. Therefore, the Procurement Integrity Act's employment discussion restrictions did not apply.[961] Remarkably, the GAO reached this conclusion despite Mr. Braa's reviewing and marking up two drafts of the SOW, apparently because the agency substantially revised the SOW following Mr. Braa's retirement.

2. Procurement Integrity Act.—

a. Conversations at a Trade Show Can Be Dangerous.—*Lockheed Aircraft Service Co.*[962] demonstrates the potential dangers involved in an act as seemingly innocuous as attending a trade show. An Air Force major, who would later become involved in a procurement for modifications to a particular helicopter, attended a trade show. While there, he stopped at an International Business Machines Company (IBM) display which included a mock-up of the helicopter's cockpit. The major inspected the mock-up and discussed it with IBM personnel. After losing the contract to IBM, Lockheed protested the award. Among other things, Lockheed alleged the major had disclosed source selection information[963] which gave IBM an unfair competitive advantage. The GAO denied the protest because it found no evidence that the discussion between the major and IBM included any information that could be classified as source selection information or that could give IBM any competitive advantage.

b. The GAO Upholds Award of Contract While Investigation of Alleged Procurement Integrity Act Violation Still Pending.—During the conduct of a procurement, a competing contractor learned of a rumor that a competitor had obtained its proposed costs.[964] The contractor informed the agency of this rumor and was told that the agency's IG was investigating the allegation.[965] When the agency awarded the contract prior to the completion of the IG investigation, the contractor protested.[966] The GAO denied the protest, finding that the agency had followed the regulatory procedures for dealing with an alleged Procurement Integrity Act violation.[967]

---

[956] B-255580.3, Aug. 2, 1994, 94-2 CPD ¶ 63.

[957] At this time, Mr. Braa knew that RCI would be a competitor for the follow-on contract.

[958] 18 U.S.C. § 208. This statute prohibits a government employee from participating personally and substantially in a matter that would affect the financial interests of a firm with which the employee is negotiating for employment.

[959] According to the GAO, because 18 U.S.C. § 208 is a criminal statute, its interpretation and enforcement are the responsibility of the procuring agency and the Department of Justice.

[960] 41 U.S.C. § 423(b)(1) (as implemented by *FAR* 3.104-6(a)).

[961] The Act's restrictions apply only to procurement officials. *Id.* § 423(b). Implementing regulations define "procurement official" as an employee who has participated personally and substantially in certain defined activities, including drafting or reviewing and approving a SOW. FAR 3.104-4(h)(1).

[962] B-255305, Feb. 22, 1994, 94-1 CPD ¶ 205.

[963] Defined at *FAR* 3.104-4(k).

[964] These costs were included as part of the contractor's first BAFO.

[965] Disclosure of this information by a government employee would violate 41 U.S.C. § 423(d) (as implemented by *FAR* 3.104-5(a)).

[966] Loral Western Dev. Labs, B-256066, May 5, 1994, 94-1 CPD ¶ 295.

[967] *See* FAR 3.104-11. *Federal Acquisition Regulation* 3.104-11(f) provides that the HCA may authorize a contracting officer to award a contract in the face of an alleged violation.

3. Standards of Conduct.—The Secretary of the Army has exempted certain persons from the requirement to file *Standard Form 450 (SF 450)*.[968] The Secretary exempted those persons who meet the standards at 5 C.F.R. § 2634.904 (a)(1)(i),[969] but who do not work in a contracting office and deal only with procurements that do not exceed $2500 at any one time or $25,000 in a twelve-month period.

E. Freedom of Information Act (FOIA)[970]

1. Navy and Air Force Promulgate New FOIA Guidance.—Both the Navy and Air Force have issued regulations concerning release of information under the FOIA. The Air Force guidance[971] addresses what records are covered under the FOIA, provides procedural guidance on submitting and responding to FOIA requests, and provides procedural guidance for calculating fees for requested information. The Navy guidance[972] amends Secretary of the Navy Instruction 5720.45 to more clearly define what constitutes a FOIA record and to prescribe information concerning release of information.

2. SDB Compliance Reports Not Covered by Exemption 4.—In *GC Micro Corp. v. Defense Logistics Agency*,[973] an SDB made a FOIA request to the DLA for copies of *SF 294* (Report of Contractor Compliance with Small Disadvantaged Business Goals) and *SF 295* (Quarterly Small Disadvantaged Business Progress Report) for Loral Aerospace, McDonnell Douglas, and Northrop Corporation. The DLA released copies of *SF 295*, but refused to release copies of *SF 294*, citing Exemption 4.[974] Reversing the district court, the United States Court of Appeals for the Ninth Circuit held that the DLA failed to establish that release of the information would cause "competitive harm" under the *National Parks* test.[975] Consequently, Exemption 4 did not apply, and the court ordered the DLA to release the information.

3. One Court Declines to Follow Critical Mass.—A district court in the Fourth Circuit has refused to adopt the District of Columbia Circuit's *Critical Mass* test[976] and upheld the GSA's partial release of unit prices. In *Comdisco, Inc. v. General Services Administration*,[977] the court heard a "reverse FOIA"[978] suit from a contractor seeking to block a FOIA release of unit pricing information. The court held that because the Fourth Circuit had not adopted the *Critical Mass* test, it was bound by prior Fourth Circuit precedent[979] adopting the *National Parks* test. The court also noted that "there is no sound reason for limiting *National Parks* to information submitted under compulsion" and, in a footnote, suggested that a prior decision of the same district court was in error.[980]

4. Payroll Records Withheld Under Exemption 6.—In *Painting Industry of Hawaii Market Recovery Fund v. Department of the Air Force*,[981] the Air Force successfully defended against the release of contract payroll records with an Exemp-

---

[968] Memorandum, Secretary of the Army, to Designated Agency Ethics Official, subject: Determination Concerning Exclusions from Filing the Confidential Financial Disclosure Report (29 Sept. 1994).

[969] These standards refer to employees whose positions require them to participate personally and substantially through decision or the exercise of significant judgment regarding contracting or procurement.

[970] 5 U.S.C. § 552.

[971] 59 Fed. Reg. 50,834 (1994) (effective Mar. 31, 1994, to be codified at 32 C.F.R. pt. 806).

[972] 59 Fed. Reg. 46,760 (1994) (effective Sept. 12, 1994, to be codified at 32 C.F.R. pt. 701).

[973] 33 F.3d 1109 (9th Cir. 1994).

[974] 5 U.S.C. § 552 (b)(4). Under this exemption, agencies may withhold information that constitutes "trade secrets and commercial and financial information obtained by a person and privileged and confidential."

[975] National Parks & Conservation Assn. v. Morton, 498 F.2d 765 (D.C. Cir. 1974). Under this test, information is considered "confidential" for Exemption 4 purposes if either: (1) disclosure would impair the agency's ability to obtain the information in the future; or (2) disclosure would cause substantial competitive harm to the supplier.

[976] Critical Mass Energy Project v. Nuclear Reg. Comm'n, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993) (holding that Exemption 4 applied to information voluntarily provided to the government that was not normally released to the public).

[977] No. 94-604-A, 1994 U.S. Dist. LEXIS 14727 (E.D. Va. Oct. 11, 1994).

[978] In a "reverse FOIA" action, the provider of information seeks injunctive relief prohibiting the agency from releasing information. These actions are based on the Administrative Procedures Act (5 U.S.C § 706), which allows private parties to challenge agency actions that are allegedly arbitrary, capricious, or otherwise not in accordance with law.

[979] Acumenics Research & Technology v. Department of Justice, 843 F.2d 800 (4th Cir. 1988).

[980] *Comdisco Inc.*, 1994 U.S. Dist. LEXIS 14727, at *22. The prior decision was Environmental Technology, Inc. v. EPA, 822 F. Supp. 1226 (E.D. Va. 1993).

[981] 26 F.3d 1479 (9th Cir. 1994).

tion 6 argument.[982] In that case, the Ninth Circuit rejected a requester's attempt to obtain payroll records submitted by construction contractors to the government.[983] Relying on Supreme Court precedent,[984] the court held that the records contained significant personal information about individual workers, and that the minimal public interest in determining the government's ability to monitor wage law compliance did not outweigh the intrusion into personal privacy interests.

F. Taxation

1. Missouri Tax Cases Returned to State Level.—In *United States v. Lohman*,[985] the Court of Appeals for the Eighth Circuit (Eighth Circuit) reversed a district court ruling[986] which gave the government standing to seek a refund of sales taxes paid by a government contractor. The government had reimbursed the contractor for the sales taxes pursuant to a cost-reimbursement contract for operating a munitions plant. The district court held that the contractor's purchases were purchases for resale and, thus, were exempt from Missouri sales tax.[987] The Eighth Circuit initially affirmed the district court,[988] but the Supreme Court vacated the decision and remanded the case[989] for consideration in light of *United States v. California*.[990] On remand, the Eighth Circuit held that the reimbursement of tax payments by the federal government to its contractors did not give the federal government a direct cause of action against the state for improper payment of taxes. Instead, the court held that the reimbursement only made the federal government a subrogee of the contractor to challenge the taxes. The court concluded that the government's only recourse would be to pursue the claim as the contractor's subrogee through the Missouri administrative and judicial systems.[991]

2. The GAO Finds Telephone Charges Are Unconstitutional Taxes.—Last year, the GAO ruled on whether the United States was obligated to pay telephone charges for emergency 911 service imposed by North Carolina,[992] Wyoming,[993] and Michigan.[994] In all three cases, the GAO held that the telephone charges were unconstitutional vendee taxes which the United States had no obligation to pay.[995]

G. Nonappropriated Fund Contracting Cases

1. Federal Circuit Refuses Jurisdiction over Nonappropriated Fund Instrumentality (NAFI) Contract Dispute.—In a nonprecedential opinion, the Federal Circuit dismissed for lack of jurisdiction an appeal from an ASBCA decision against a NAF contractor.[996] The contractor argued that a section of the CDA[997] gave the court jurisdiction. However, cit-

---

[982] 5 U.S.C. § 552(b)(6). This exemption applies to information considered a "clearly unwarranted invasion of personal privacy." For a recent detailed analysis of this exemption, *see* United States Dep't of Defense v. FLRA, 114 S. Ct. 1006 (1994).

[983] Under the Copeland Anti-Kickback Act, 40 U.S.C. § 276c, federal construction contractors must submit certified payroll records to the contracting agency. The agency uses the records to monitor compliance with federal wage laws, such as the Davis-Bacon Act (40 U.S.C. § 276a).

[984] *See* United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).

[985] 21 F.3d 844 (8th Cir. 1994).

[986] United States v. Benton, 772 F. Supp. 453 (W.D. Mo. 1990).

[987] Missouri taxes goods sold at retail, but excludes goods purchased for resale. MO. ANN. STAT. §§ 144.010(8), 144.020.1 (Vernon 1994 Supp.). The government argued that under *FAR* 52.245-5(c)(2) and (c)(3), the government took title to all goods purchased by the contractor that were reimbursed under the contract; thus, the contractor purchased these goods for resale, and the goods should not be subject to Missouri sales tax.

[988] United States v. Benton, 975 F.2d 511 (8th Cir. 1992), *vacated sub nom.* United States v. Melcher, 113 S. Ct. 2925 (1993).

[989] United States v. Melcher, 113 S.Ct. 2925 (1993).

[990] 113 S. Ct. 1784 (1993).

[991] The contractor did file a claim for refund with the Missouri Department of Revenue; therefore, the issue becomes whether the federal government may become a party in the contractor's refund action.

[992] Telephone Surcharge—State of N.C., B-254712, 1994 U.S. Comp. Gen. LEXIS 312 (Feb. 14, 1994).

[993] Telephone Surcharge—State of Wyo., B-255092, 1994 U.S. Comp. Gen. LEXIS 313 (Feb. 14, 1994).

[994] Emergency Telephone Charges—State of Mich., B-254628, 1994 U.S. Comp. Gen. LEXIS 320 (Apr. 7, 1994).

[995] A "vendee" tax is a direct tax imposed on the buyer of goods, the consumer of services, or the owner of property. The United States is constitutionally immune from direct taxation by states. McCullough v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). For a detailed discussion of vendee taxes, *see* 9-1-1 Emergency Number Fee, B-215735, 64 Comp. Gen. 655 (1985).

[996] Maitland Bros. v. Widnall, No. 94-1107, 1994 U.S. App. LEXIS 33097 (Fed. Cir. Nov. 21, 1994). Under Federal Circuit Rule 47.8, nonprecedential cases cannot be cited as precedent in later arguments.

[997] 41 U.S.C. § 609(b).

ing one of its earlier opinions,[998] the court held that it only had jurisdiction to hear ASBCA appeals concerning contracts subject to the CDA.[999] Because the ASBCA's jurisdiction to hear the original appeal was not based on the CDA,[1000] the court had no jurisdiction.

2. The GAO Considers NAF Contract Protest.—The GAO has held that it has no jurisdiction over NAF procurements by a NAFI.[1001] However, in *Premier Vending*,[1002] the GAO announced that it would consider allegations that the agency is using the NAFI to circumvent procurement statutes. In this case, the protester alleged, after the deadline for receipt of proposals, that the Boron Federal Prison Camp Employees Club—a NAFI operating under the Federal Bureau of Prisons (BOP)—solicited vending machine services on behalf of the BOP. Although the protester did not file the protest timely, the GAO elected to hear the protest on the merits.[1003] Nevertheless, the GAO denied the protest because it found that the NAFI's vending machine operation was totally independent from the BOP's vending machine operation and that the BOP was not using the NAFI to circumvent competition.

3. The ASBCA Awards Breach Damages in NAF Contract Case.—In *Keith L. Williams*,[1004] the ASBCA considered a contractor's claim for breach damages under a NAF Ordering Agreement for entertainment. Based on information that the contractor was stealing government funds, the NAFI terminated the ordering agreement and contacted the Army's CID. Although it could not substantiate the allegations, the CID confiscated the contractor's cash receipts and his keys to the club, precluding him from further performing. The contractor claimed breach damages for the lost performances. The board held that the NAFI's communicating of unfounded rumors to the CID breached the call order provisions of the ordering agreement, entitling the contractor to anticipatory profits.

H. Commercial Items[1005]

1. The FAR *Amended to Establish Preference for Commercial Standards.—Federal Acquisition Circular 90-20*[1006] established the following order of precedence for product descriptions: (1) voluntary standards;[1007] (2) commercial item descriptions when acquiring commercial or commercial type products; (3) functional or performance government product descriptions; and (4) government product descriptions stated in terms of design requirements.[1008] The FAC also added definitions of the terms "commercial item description" and "product description."[1009] Finally, the FAC requires, with certain exceptions, that agencies use product descriptions listed in the *Index of Federal Specifications, Standards, and Commercial Item Descriptions* (for all agencies) and in the *DOD Index of Specifications and Standards (DODISS)*.[1010] One of the listed exceptions applies when an adequate and appropriate voluntary standard is known to exist but is not yet listed in either of the indices.

2. The DOD Allows Use of Commercial Quality Standards.—A February 14, 1994 memorandum from the Under

---

[998] Tatelbaum v. United States, 749 F.2d 729 (Fed. Cir. 1984).

[999] The CDA does not apply to contracts awarded by NAFIs, except for contracts awarded by the service exchanges (*i.e.*, AAFES, Navy Exchange). 41 U.S.C. § 602.

[1000] The ASBCA jurisdiction to hear NAFI contract disputes (other than exchanges) is based on the disputes clause of the contract, not the CDA.

[1001] *See* 31 U.S.C. §§ 3551-3553; DSV, GmbH, B-253724, June 16, 1993, 93-1 CPD ¶ 468. The GAO's rationale is that NAFIs are not considered "federal agencies" for GAO jurisdiction purposes.

[1002] B-256650, July 5, 1994, 94-2 CPD ¶ 8.

[1003] The protest was untimely because the protester waited until after the proposal submission date to challenge the specification. Under the normal GAO procedure, such protests must be filed prior to bid opening or by the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1994). However, the GAO invoked its "significant issue" exception to its rules (4 C.F.R. § 21.2(c) (1994)) because the issue of whether an agency is improperly diverting its requirements to a NAFI to avoid competition requirements was one of first impression.

[1004] ASBCA No. 46068, 94-3 BCA ¶ 27,196.

[1005] The big news in this area, of course, is the commercial items provisions of the FASA. *See supra* notes 150-74 and accompanying text.

[1006] 59 Fed. Reg. 11,368 (1994) (effective Mar. 10, 1994, amending FAR 10.001, 10.002(d), 10.006).

[1007] *Federal Acquisition Regulation* 10.001 defines a "voluntary standard" as one "established by a private sector body and available for public use. The term does not include private standards of individual firms."

[1008] FAR 10.002(d).

[1009] *Id.* 10.001.

[1010] *Id.* 10.006.

Secretary of Defense (Acquisition and Technology) authorizes the use of commercial quality standards[1011] when their use is more efficient.[1012] The memorandum also states that contractors should be allowed to use their normal quality systems (regardless of whether modeled on military or commercial standards) whenever they meet acquisition needs.

3. Secretary of Defense Orders Shift to Performance-Based and Commercial Standards.—The Secretary has directed the DOD to use performance specifications, or if use of a performance specification is not possible, a nongovernment standard.[1013] Military specifications may be used only as "a last resort," after the procuring activity obtains a waiver.[1014]

I. Contracting for Services

1. Commercial Activities.—

a. Moratorium Expires.—The National Defense Authorization Act for Fiscal Year 1994[1015] extended the moratorium on the award of new Commercial Activities Program (CAP) contracts through April 1, 1994. Because Congress did not further extend the moratorium, agencies now may award new CAP contracts.

b. Decision to Perform Services In-House Is Subject to CICA Stay.—A federal district court has ruled that an Air Force decision to perform security guard services in-house is equivalent to a contract award for purposes of applying the CICA stay.[1016] The Air Force issued a solicitation for guard services to provide a cost comparison for a contracting-out decision pursuant to *OMB Circular A-76.* When the Air Force decided to perform the services in-house, an offeror protested to the GAO.[1017] Fearing that the Air Force would complete the transfer before the GAO could rule on its protest, the offeror filed suit in the district court seeking an injunction applying the CICA stay. The Air Force argued that the CICA stay did not apply because the decision to perform the work in-house was not a "contract award" as that term is used in the CICA.[1018] Rejecting the Air Force's argument, the court found that the opposite result was required to "uphold the purposes behind the CICA."[1019] Ultimately, the GAO denied the offeror's protest, upholding the Air Force's determination to perform the services in-house.[1020]

2. Service Contracting.—

a. Change of Rates Clause Does Not Render Utility Services Contract Illusory.—In 1972 the Air Force entered into a contract with the city of Tacoma, Washington, under which Tacoma agreed to provide electricity to an Air Force installation. The contract contained a "change of rates" clause which provided that either party could request a rate change and, if requested, the parties would negotiate the rates. A dispute developed over a proposed rate increase and the city eventually filed a claim. The Air Force paid the amount that it believed due the city, denying the remainder of the city's claim. The city appealed, arguing that the clause rendered the contract illusory because it merely was an agreement to agree, leaving the government free to refuse a rate increase without consequence. In *City of Tacoma v. United States,*[1021] the Federal Circuit rejected this argument. The court held that a contract term allowing for future negotiations, such as the change of rates clause, "impliedly imposes an obligation on the parties to negotiate in good faith."[1022] Additionally, the city was not without recourse because it could challenge a government

[1011] These standards include the International Organization for Standardization (ISO) 9000 series and the American National Standards Institute/American Society for Quality Control (ANSI/ASQC) Q90 series.

[1012] *DOD Removes Barriers to Use of Commercial Quality Standards*, 36 Gov't Contractor (CCH) ¶ 112 (Feb. 23, 1994).

[1013] Memorandum, Secretary of Defense, subject: Specifications and Standards—A New Way of Doing Business (29 June 1994).

[1014] Waivers are not required: (1) for reprocurement of an item in inventory; (2) if the contractor proposes the use of a military specification or standard in response to the solicitation; or (3) if the military specification/standard is cited for guidance only. *See* DOD STANDARDIZATION NEWSLETTER (Dep't of Defense, Defense Standards Improvement Council), Oct. 1994.

[1015] Pub. L. No. 103-160, § 313, 107 Stat. 1547, 1618 (1993).

[1016] Inter-Con Sec. Sys., Inc. v. Widnall, No. C-94-20442, 1994 U.S. Dist. LEXIS 10995 (N.D. Cal. July 11, 1994) (order granting plaintiff's motion for a preliminary injunction).

[1017] Inter-Con Sec. Sys., Inc., B-257360.3, 94-2 CPD ¶ ____, 1994 WL 653412 (Nov. 15, 1994).

[1018] *See* 31 U.S.C. § 3553(c), (d).

[1019] *Inter-Con Sec. Sys., Inc.*, 1994 U.S. Dist. LEXIS 10995 at *5. The court stated, "[t]he stay provisions of CICA 'were designed to preserve the status quo until the Comptroller General issued his recommendation, in order to ensure that the recommendation would be considered.'" *Id.* at *2 (quoting Lear Siegler, Inc. v. Lehman, 842 F.2d 1102, 1004 (9th Cir. 1988)).

[1020] Inter-Con Sec. Sys., Inc., B-257360.3, 94-2 CPD ¶ ____, 1994 WL 653412 (Nov. 15, 1994).

[1021] 31 F.3d 1130 (Fed. Cir. 1994).

[1022] *Id.* at 1132 (citations omitted).

decision through the disputes process. The court concluded that the contract was not illusory.

b. The OFPP Attempts to Change the Government's Philosophy Regarding Service Contracting.—The OFPP reissued *Policy Letter 93-1, Management Oversight of Service Contracts.*[1023] The purpose of the policy letter is to provide "guiding principles through the 'best practices' concept that should help agencies develop, analyze, and perfect requirements for service contracts which, in turn, should improve contract management and administration."[1024] *Policy Letter 93-1* provides two examples of the "best practices" that contracting officials should use: (1) review of the corporate experience section of an offeror's proposal to detect conflicts of interest; and (2) review of monthly progress reports to detect whether the contractor is performing inherently governmental functions.[1025] The policy letter also states that the OFPP will be issuing government-wide best practices models in contract administration as separate guidance.

More recently, twenty-six federal agencies and four industry trade associations signed a voluntary pledge with the OFPP to convert eighty-seven specified service contracts to a performance-based approach.[1026] This pledge was the latest in the OFPP's attempt to implement *OFPP Policy Letter 91-2, Service Contracting.*[1027] *Policy Letter 91-2* established a government-wide preference for performance-based service contracting.[1028]

J. Research and Development (R&D) Contracts and Agreements

1. The DOD Adopts Streamlined R&D Contracting Procedures.—Laboratories supporting the military departments now may use simplified procedures for awarding cost-reimbursement R&D contracts of ten million dollars or less.[1029] The streamlined procedures provide for: synopsis of the requirement and notice that a complete, standardized solicitation will be printed in the *CBD* in lieu of a conventional solicitation; issuance of a supplemental package to interested parties if the solicitation exceeds three-and-one-half pages, or contains forms or additional information; and a second notice in the *CBD* providing the streamlined solicitation, consisting of a statement of work and clauses to be incorporated by reference in the final contract. Contract awards are made on a best value basis, and without discussions whenever possible.[1030] Agencies may not use these procedures for engineering development, management services, or laboratory supplies and equipment.[1031]

2. Potential Competitor Has Standing to Challenge an Agency Award of a Cooperative Research and Development Agreement (CRADA).—In recent years, Congress has passed a number of statutes to promote the transfer of basic technologies from the government to commercial firms to enhance their competitiveness in the world marketplace,[1032] and to improve cooperation between government and industry in the development of dual-use technologies capable of succeeding commercially while preserving essential defense capabilities.[1033] These statutes generally promote the worldwide competitiveness of industry and help preserve the national defense industrial base, and were not intended to confer competitive rights on individual business. Nevertheless, the United States Court of Appeals for the Third Circuit (Third Circuit) determined that businesses have a right to challenge CRADAs awarded under these statutes,[1034] because such a right is necessary to protect against government circumvention of the requirement to use procurement contracts whenever appropri-

---

[1023] 59 Fed. Reg. 26,818 (1994).

[1024] *Id.*

[1025] *Id.* at 26,820.

[1026] *See Federal Agencies, Industry Groups Pledge to Use Performance-Based Approach on 87 Contracts*, 62 Fed. Cont. Rep. (BNA) 367 (Oct. 17, 1994).

[1027] 56 Fed. Reg. 15,110 (1991).

[1028] The policy letter defines "performance-based contracting" as "structuring all aspects of an acquisition around the purpose of the work to be performed as opposed to either the manner by which the work is to be performed or broad and imprecise statements of the work." *Id.*

[1029] *See* 59 Fed. Reg. 52,442-50 (1994) (adding a new *DFARS* subpart 235.70).

[1030] DFARS 235.7004-3.

[1031] *Id.* 235.7002(c).

[1032] *See, e.g.*, Federal Technology Transfer Act of 1986, 15 U.S.C. §§ 3710a-3710d (as amended); *see also* 10 U.S.C. §§ 2358, 2371 (DOD's basic authority to use grants, cooperative agreements, and similar transactions). Cooperative Research and Development Agreements and similar agreements entered under these authorities generally are not subject to the *FAR* or agency supplements.

[1033] *See* Defense Conversion, Reinvestment, and Transition Assistance Act of 1992, 10 U.S.C. §§ 2491, 2501-2541 (as amended).

[1034] Chem Serv., Inc. v. Environmental Monitoring Sys. Lab.—Cincinnati, 12 F.3d. 1256 (3d Cir. 1993).

ate.[1035] Therefore, the court found that a potential competitor had standing to sue under the Administrative Procedures Act[1036] to challenge whether a federal laboratory used a CRADA to circumvent statutory and regulatory procurement requirements.[1037]

K. Intellectual Property

1. New DFARS *Technical Data Rights Provisions.*—On June 20, 1994, the DOD published proposed new *DFARS* provisions to govern its acquisition of technical data rights from DOD contractors.[1038] Promulgated in response to a statutory requirement to revise DOD regulations covering technical data acquisitions,[1039] the new provisions shift the balance between protecting the government's rights and protecting industry's interests more in the direction of industry.[1040] The significant changes under the new rules[1041] include:

(1) The DOD will no longer automatically obtain unlimited rights in data merely because development of the data was necessary for the contractor to perform the contract;

(2) When contractors properly charge the cost of developing data to indirect cost pools, the development will be considered to be at the contractor's private expense;

(3) A new standard class of data rights, "Government Purpose Rights," will apply to data developed with mixed government and private funding, unless the parties agree otherwise;

(4) Expanded protection will be provided for computer software source code listings and similar data, through the inclusion of such data within the definition of "computer software"; (such data previously was within the definition of "computer software documentation,"[1042] which is not as well protected as computer software); and

(5) The DOD will be permitted to buy commercial software directly from commercial sources (without ordering through the General Services Administration) using only a commercial license agreement to govern the rights in such software.

2. Patents.

a. Licensee Challenging Patent Validity Losses Protection of Its License.—A patent licensee may challenge the validity of a patent to avoid payment of royalties.[1043] However, a licensee that fails to pay a low royalty rate negotiated in its license may not later raise the license as a shield against payment of a reasonable but higher commercial royalty rate after losing an infringement suit brought by the patent holder. In *Dow Chemical Co. v. United States*,[1044] the court found that nonpayment of royalties, and other government actions incon-

[1035] *See* 31 U.S.C. §§ 6301-6308 (defining when executive agencies are to use procurement contracts, grants, and cooperative agreements).

[1036] 5 U.S.C. §§ 701-706. The CICA and the competition provisions of the *FAR* do not apply to CRADAs. *See* FAR 6.001(b).

[1037] *Cf.* Sprint Communications Co., B-256586, May 9, 1994, 94-1 CPD ¶ 300 (GAO found no basis for it to review any challenge to the award of a cooperative agreement).

[1038] *See* 59 Fed. Reg. 31584 (1994). A revised *DFARS* subpart 227.4, "Rights in Technical Data," a new *DFARS* subpart 227.5, "Rights in Computer Software and Computer Software Documentation," an amended version of *DFARS* subpart 211.70, "Acquisition and Distribution of Commercial Products," and revised clauses in *DFARS* part 252, most likely will not become effective until the spring of 1995. For more information on the effectivity of the new provisions, call Ms. Angelena Moy at (703) 604-5385.

[1039] *See* National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 807, 105 Stat. 1290 (1991) (providing the statutory basis for the government-industry "Section 807 Committee"); *see also* 10 U.S.C. § 2320 (requiring implementing regulations to strike a proper balance between government and industry rights in technical data).

[1040] The term "industry" includes more than just original equipment developers. Although developers generally receive better protection for their innovations under the new *DFARS* provisions, replicators are less fortunate, because the DOD now will be less likely to have complete data packages suitable for reprocurement from sources other than the original manufacturer.

[1041] Although the changes noted here generally are favorable to industry, many industry proposals for change in the technical data rights area did *not* find their way into the final *DFARS* provisions. One change sought by industry that the DOD did not adopt would have made it easier for contractors to assert data rights in technical data inadvertently submitted to the government without restrictive legends. For an example of the unfortunate consequence such a submission may have for a contractor, *see* E.M. Scott & Assocs., ASBCA No. 45869, 94-3 BCA ¶ 27,059 (denying requested payment for alleged improper use of trade secrets included in a proposal that lacked any restrictive legends).

[1042] "Computer software documentation" under the proposed new *DFARS* provisions will include only users manuals and similar materials. DFARS 252.227-7014(a)(5) (draft).

[1043] Lear v. Adkins, 395 U.S. 653 (1969).

[1044] 32 Fed. Cl. 11 (1994).

sistent with the existence of a valid patent, made the license agreement void. Therefore, the license's stipulated royalty rate of twenty-five percent of the commercial royalty rate did not apply, and the government was liable for the full commercial royalty rate on all the work it performed using the patented invention.

b. Scope of Patent License Clouded by Language Making License Applicable to "Data Required in the Contract".—Continuing litigation over the rights to the technology in the Army's Single Channel Ground and Airborne Radio System (SINCGARS) highlights the need for careful draftsmanship in defining the government's license rights to the inventions used in the sophisticated hardware used by today's Armed Forces. In a recent round of litigation over transactions between the government and a contractor that occurred twenty years ago,[1045] the court noted that a patent license may be restricted by data described in a government contract. Language granting the government a patent and data license "covering data" required in the contract did not grant a license in all the inventions covered in the patent, only a license to use the inventions covered in the contract. Therefore, the government failed to prove that it has an unrestricted license for SINCGARS radios, and the infringement litigation continues.

L. Foreign Military Sales

1. The GSBCA Asserts Jurisdiction over a Foreign Military Sales (FMS) Procurement.—Without directly deciding a preliminary jurisdictional issue, the GSBCA recently granted a protest involving the Army's procurement of ADPE for a foreign government pursuant to an FMS case.[1046] The Army moved to dismiss the protest for lack of jurisdiction, because the Brooks Act[1047] applies only to *federal agency* procurements, not those of other governments. The GSBCA decided the merits of the protest, however, without addressing the Army's jurisdictional arguments. The Army attempted without success to persuade the Justice Department to appeal the jurisdictional issue to the Federal Circuit. Nevertheless, government attorneys should continue to raise jurisdictional challenges to GSBCA protests involving acquisitions supporting FMS cases, because a suitable case in the future may merit a Justice Department appeal of the issue to the Federal Circuit.

2. Change 6 to Security Assistance Management Manual (SAMM) *Issued.*—On May 10, 1994, the Defense Security Assistance Agency promulgated Change 6 to the *SAMM,*[1048] the DOD's handbook on the procedures and policies applicable to its security assistance programs. Significant provisions in Change 6 include: new guidelines on furnishing price and availability information to potential FMS customers;[1049] revisions to the terms and conditions of FMS cases related to contractor personnel costs;[1050] new guidance on warranties provided through FMS cases;[1051] and updated information regarding the management of excess defense articles.[1052]

3. Foreign Military Financing of Direct Commercial Sales Continues.—Reversing a policy decision made last year that would have ended foreign military financing of direct commercial sales, the DOD announced that it will continue to finance some foreign government purchases of defense supplies and services directly from American contractors.[1053] The DOD had proposed to limit foreign military financing to FMS cases (*i.e.*, government-to-government sales), to curb past abuses in direct commercial sales financing arrangements. Under the new policy, the DOD will only finance direct commercial sales above $100,000 in value (above $20,000 for Israel), and only if those sales meet certain prerequisites. The Defense Security Assistance Agency will issue additional guidance on the use of foreign military financing for direct commercial sales early in 1995.[1054]

4. Export Control Regulations Continued.—On August 20, 1994, the Export Administration Act of 1979[1055] expired, ending the statutory basis for many of the Commerce Department's regulations that control the export of American goods,

---

[1045] Rockwell Int'l v. United States, 31 Fed. Cl. 70 (1994).

[1046] Integrated Sys. Group, Inc. v. Department of the Army, GSBCA No. 12489-P, 94-1 BCA ¶ 26,391.

[1047] 40 U.S.C. § 759.

[1048] DEP'T OF DEFENSE, MANUAL 5105.38-M, SECURITY ASSISTANCE MANAGEMENT MANUAL (Oct. 1, 1988) (C6, May 10, 1994).

[1049] *Id.* para. 70002.

[1050] *Id.* tbl. 701-7.

[1051] *Id.* para. 80105.

[1052] *Id.* sec. 803.

[1053] 59 Fed. Reg. 36,743 (1994).

[1054] Additional guidance was due in September 1994. *See id.* Based on telephonic coordination with the Defense Security Assistance Agency's Operations Management Division, we expect release of the new guidelines in early 1995. For more information, call that office at (703) 604-6635.

[1055] 50 U.S.C. app. §§ 2401-2420, *amended by* Pub. L. No. 103-277, 108 Stat. 1407 (1994).

technology, and technical data.[1056] Nevertheless, pursuant to Executive Order 12,924,[1057] these regulations remain in effect. In his executive order, President Clinton declared a national emergency with respect to the threat that would occur if foreign countries had unrestricted access to American goods, technology, and technical data. He also ordered that the Commerce Department's regulations remain in effect indefinitely, notwithstanding the lack of specific statutory authority for their issuance.

M. Bankruptcy Developments

1. New Bankruptcy Legislation.—On October 22, 1994, the President signed the Bankruptcy Reform Act of 1994.[1058] The changes it made to the Bankruptcy Code[1059] that are likely to have the greatest effect on government contracts practice include: (1) a substantially modified and expanded waiver of sovereign immunity for governmental units; (2) a new provision allowing governmental units 180 days after a bankruptcy filing to file a proof of claim;[1060] (3) an expedited hearing procedure for motions for relief from the automatic stay; and (4) specific authority for bankruptcy judges to issue orders establishing deadlines for assumption of executory contracts, as long as such orders are not "inconsistent" with the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure.

2. When Does a Claim Arise?—Determining whether the government's claim "arises" prepetition or postpetition is frequently critical in bankruptcy cases. During the past year, courts began to articulate an emerging standard for determining when claims of a governmental entity arise for bankruptcy purposes. Under this standard, a claim arises when: (1) all "transactions" or acts necessary for asserting liability have occurred; and, (2) there is some prepetition relationship, "such as contract, exposure, impact, or privity" between the United States and the debtor, such that the government is able to "fairly contemplate" that it might have a claim against the debtor.[1061] Thus, the courts recognize that the definition of a claim in bankruptcy is much broader than a claim under the Contract Disputes Act. For example, one court held that "[w]hen parties agree in advance that one party will indemnify the other in the event of a certain occurrence, there exists a 'right to payment,' albeit contingent, *upon the signing of the agreement.*"[1062]

3. Setoff Among Agencies.—Setoff against a corporation in bankruptcy requires that the debts of the parties be mutual. Although the United States has long asserted, generally with success, that all federal agencies are one entity for setoff purposes in bankruptcy cases, several courts during 1994 followed an emerging and contrary trend, holding that federal agencies may not setoff among themselves.[1063] The Justice Department has filed appeals of these decisions.

4. Freezing Funds Owed by the Government to the Debtor.—Whether the government may hold funds otherwise payable to a debtor in bankruptcy, because those funds are subject to setoff, remained controversial in the past year. Several courts agreed with the position of the United States, holding that the government may "freeze" the funds and assert that they are held "subject to" setoff, but delay consummating setoff (often a mere bookkeeping entry) without violating the stay.[1064] However, other courts, including one circuit court, have found that the failure to pay, or a bank "freeze," is an actual setoff or, at least, a violation of the stay.[1065]

5. Setoffs in Violation of the Stay.—In 1994, courts began to recognize that denial of an otherwise valid right of setoff is not warranted as punishment for a violation of the automatic stay. These courts held that, at most, the debtor should be

---

[1056] *See* 15 C.F.R. pts. 768-799.

[1057] 59 Fed. Reg. 43,437 (1994).

[1058] Pub. L. No. 103-394, 108 Stat. 4106 (1994).

[1059] *See* 11 U.S.C. (Bankruptcy).

[1060] Governmental units also may use later deadlines when allowed by generally applicable bankruptcy rules.

[1061] *See* Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1274-77 (5th Cir. 1994); In re Midway Indus. Contrs. Inc., 167 B.R. 139, 142-43 (Bankr. N.D. Ill. 1994) (holding that tax refund claim arises at end of tax year, not when debtor files return); In re Piper Aircraft Corp., 162 B.R. 619 (Bankr. S.D. Fla.), *aff'd*, 168 B.R. 434 (S.D. Fla. 1994) (discussing various theories of when claims arise).

[1062] In re Metco Mining & Minerals, Inc., 171 B.R. 210, 216-17 (Bankr. W.D. Pa. 1994) (emphasis added).

[1063] In re Pyramid Indus., Inc., 170 B.R. 974 (Bankr. N.D. Ill. 1994) (SBA and the Navy are not the same entity for setoff); In re Ionosphere Clubs, Inc., 164 B.R. 839 (Bankr. S.D. N.Y. 1994) (GSA and IRS are not the same entity for setoff).

[1064] Moreira v. Digital Employees Fed. Credit Union, No. 94-4278, 1994 WL 608596 (Bankr. D. Mass. Nov. 4, 1994); In re Lough, 163 B.R. 586, 588 (Bankr. D. Idaho 1994); In re Custom Ctr., Inc., 163 B.R. 309, 319 (Bankr. E.D. Tenn. 1994).

[1065] Citizens Bank of Maryland v. Strumpf, 37 F.3d 155 (4th Cir. 1994) (holding that bank freeze is "tantamount to the exercise of a right of setoff and thus violates the automatic stay"); In re Hudson, 168 B.R. 449, 452-53 (Bankr. S.D. Ga. 1994) (IRS withholding violates automatic stay); In re Midway Indus. Contractor, Inc., 167 B.R. 139, 143-44 (Bankr. N.D. Ill. 1994) (same).

entitled to damages suffered on account of the stay violation.[1066] Because federal agencies frequently setoff in violation of the stay, this emerging trend offers some relief from the potential loss of the government's underlying claim against a bankrupt's estate.

6. Effect of Rejection of a Government Contract.—The effect of a debtor's rejection of a contract in bankruptcy was again a controversial topic during 1994. Most courts accepted the proposition that rejection does not mean the contract does not exist; it merely constitutes a breach of the contract, and the terms of the contract still control the relationship of the parties.[1067] One court aptly described the effect of rejection in these terms:

> The Trustee's rejection of the contract . . . does not render the contract non-existent. . . . [Nor does] the Trustee's rejection extinguish the Debtor's obligations under the . . . provisions of the contract or render the [contract's] provisions inapplicable as of the date of rejection. . . . [Finally], the rejection does not relieve the Trustee of his obligations which arise from the period of time during which the Trustee operated the business [postpetition, but prior to rejection].[1068]

Nevertheless, another court apparently attributes more legal effect to a rejection than the above explanation would suggest. The Eighth Circuit held that the Post Office's claims arising from rejection of an executory contract in bankruptcy are not available for recoupment, despite explicit terms in the contract stating that recoupment was permissible.[1069]

7. Stay of Litigation by the Debtor.—Until recently, every circuit of the United States Court of Appeals to address the issue had held that the automatic stay prevents a debtor from appealing the decision of a nonbankruptcy forum where an action was originally commenced against the debtor.[1070] In other words, a debtor-defendant generally may not appeal from an adverse ruling in a district court to the appellate court of appeals without relief from the stay. In prohibiting such appeals, courts have relied on the statute which stays "any continuation" of a judicial proceeding against the debtor. Recently, relying on an apparent inconsistency between the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure, the Tenth Circuit held that a debtor does not need relief from the stay to appeal an adverse ruling—if the debtor was the defendant in the district court.[1071]

8. Annulment of the Automatic Stay.—An act taken in violation of the stay, even without knowledge of the bankruptcy filing, is generally held to be void. However, in 1994 the Third Circuit resurrected a little-used method to avoid this onerous result—annulling the stay.[1072] Annulment of the stay retroactively terminates the automatic stay so as to validate actions that may have been taken in violation of the stay. "When a court annuls the automatic stay . . . it is as if the stay never existed for that particular party."[1073] This theory may provide the government, which frequently violates stays inadvertently, some possible relief.

N. Costs and Cost Accounting

1. Cost Accounting Standards (CAS).—

a. Contractor Must Allocate Taxes Based on Nature of The Tax.—In *General Motors Corp. v. Aspin*,[1074] the Federal

[1066] In re Hudson, 168 B.R. 449, 453 (Bankr. S.D. Ga. 1994) (court finds IRS withholding is a violation of the stay, but permits setoff nonetheless; violation of stay only entitles debtor to recovery under 11 U.S.C. § 362(h)); In re Midway Indus. Contractor, Inc., 167 B.R. 139, 144 (Bankr. N.D. Ill. 1994) (offset in violation of the stay is not "sufficient reason to deny the [IRS] the modification of the stay"—court sanctions IRS under 11 U.S.C. § 362(h) instead); In re Lough, 163 B.R. 586, 589 (Bankr. D. Idaho 1994) (11 U.S.C. § 362(h) does not allow sanctions for freezing funds, even if such action is a technical violation of the automatic stay); In re Custom Ctr., Inc., 163 B.R. 309, 318-19 (Bankr. E.D. Tenn. 1994) (withholding funds, even if a violation of the automatic stay, does not justify denial of otherwise valid right of setoff). *But see* In re Operation Open City, Inc., 170 B.R. 818, 825 (S.D. N.Y. 1994) (setoff in violation of stay is void and warrants turnover order against creditor).

[1067] In re Austin Dev. Co., 19 F.3d 1077, 1082 (5th Cir.), *cert. denied*, 115 S. Ct. 201 (1994) (holding that rejection is merely a breach of contract; it does not terminate the contract).

[1068] In re Old Electralloy Corp., 167 B.R. 786, 791 (Bankr. W.D. Pa. 1994).

[1069] United States v. Dewey Freight Sys., Inc., 31 F.3d 620 (8th Cir. 1994).

[1070] *See* In re Keene Corp., 171 B.R. 181 n.1 (Bankr. S.D. N.Y. 1994) (citing numerous cases); In re Capgro Leasing Assocs., 169 B.R. 305, 310-13 (Bankr. E.D. N.Y. 1994) (same).

[1071] Chaussee v. Lyngholm, 24 F.3d 89, 91-92 (10th Cir. 1994).

[1072] In re Siciliano, 13 F.3d 748 (3d Cir. 1994).

[1073] In re Siciliano, 167 B.R. 999, 1007 (Bankr. E.D. Pa. 1994) (case after remand from Third Circuit; the decision collects cases and includes a comprehensive discussion of factors to be considered in annulling the stay).

[1074] 24 F.3d 1376 (Fed. Cir. 1994).

Circuit overturned a decision of the ASBCA and held that CAS 403[1075] requires direct allocation of state gross income tax to the extent the tax can be identified with instate segments. The *Indiana Code* required General Motors (GM) to pay a gross income tax (GIT) based on in-state income and an adjusted gross income tax (AGIT) derived from GM's adjusted federal income from Indiana sources. Because the GIT could be identified with in-state segments, GM could directly allocate GIT to segments based on income. General Motors had to allocate AGIT indirectly, however, because it was based on all of GM's income. Under Indiana law, taxpayers could offset GIT with AGIT and vice versa. After applying the offset, GM used the allocation method appropriate for the greater of the two taxes. Thus, if a segment's GIT was greater than AGIT, GM treated all of the tax as GIT and allocated it directly to the in-state segment. The Federal Circuit held that this allocation method did not comply with CAS 403 because it disregarded the distinct identities of the taxes and overallocated taxes to GM's Indiana segments.

b. The ASBCA Allows Transfer of Research Costs from Contract to Bid and Proposal/Independent Research and Development (B&P/IR&D).—When the Federal Aviation Administration (FAA) elected not to fund continued performance under a design contract, the contractor transferred its research costs from the discontinued contract to its B&P/IR&D indirect cost pools.[1076] When the contractor attempted to allocate these costs to an unrelated Air Force contract, the Air Force disallowed the costs, contending that the allocation violated CAS 402 because it treated similar costs inconsistently.[1077] The board allowed the allocation because, after the FAA's funding decision, the design costs no longer could be charged directly to a specific contract. Although there were similarities between the work charged under the design contract and that later charged as B&P/IR&D, the board found that the government failed to prove that the costs were "incurred for the same purpose, in like circumstances," in contravention of CAS 402.

c. Foreign Sales Commissions Must Be Specially Allocated Based on Relationship.—Over a fifteen-year period, Aydin Corporation had been allocating its foreign sales commissions over a total cost base through its G&A cost pool.[1078] In September 1989, the DCAA reviewed and approved this indirect allocation method. During the audit, however, Aydin did not reveal that a foreign contract (the "Solar II contract") would cause a five-fold increase in sales commissions over the prior year. The DCAA noted that the Solar II sales commission represented over ninety-one percent of Aydin's total sales commissions for 1989, although that contract represented only nineteen percent of the total cost base. The Air Force, administering an unrelated contract, removed the Solar II commissions from the G&A pool and adjusted the contractor's progress payments accordingly. On appeal, the board denied Aydin's claim for full progress payments, holding that it must specially allocate the Solar II sales commissions as direct costs of the Solar II contract.[1079]

d. Determination of Noncompliance with CAS May Be an Appealable Final Decision.—In *Litton Systems, Inc.*,[1080] the contracting officer issued, and the contractor appealed, a "final determination" of CAS noncompliance. The government moved for summary judgment on jurisdictional grounds, contending that the contracting officer's determination was not a final decision, but was an attempt to resolve the CAS compliance dispute. The board disagreed, holding that the contracting officer's "final determination" was an appealable government claim, as defined by *FAR* 33.201.[1081] That the final determination was not styled a "final decision," did not demand a sum certain, and did not advise the contractor of its appellate rights was immaterial to the board.

[1075] Cost Accounting Standard 403 provides in pertinent part:

> Central payments or accruals which are made by a home office on behalf of its segments shall be allocated directly to segments to the extent that all such payments or accruals of a given type or class can be identified specifically with individual segments. . . . Common examples of [central payments] include . . . state income taxes. Any such types of payments or accruals which cannot be identified specifically with individual segments shall be allocated to benefited segments using an allocation base representative of the factors on which the total payment is based.

See FAR app. B; CAS 403.40(b)(4).

[1076] Unisys Corp., ASBCA No. 41135, 94-2 BCA ¶ 26,894.

[1077] Cost Accounting Standard 402 provides in pertinent part: "All costs incurred for the same purpose, in like circumstances, are either direct costs only or indirect costs only with respect to final cost objectives." 48 C.F.R. § 9904.402-40 (1993).

[1078] Aydin Corp. (West), ASBCA No. 42760, 94-2 BCA ¶ 26,905.

[1079] The CAS allow for "special allocations" when the amount of G&A being allocated to a final cost objective is significantly disproportionate to the benefit received by that cost objective. 48 C.F.R. § 9904.410-40 (1993).

[1080] ASBCA No. 45400, 94-2 BCA ¶ 26,895.

[1081] *Federal Acquisition Regulation* 33.201 defines a claim as a "written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms or other relief arising under or relating to the contract."

2. Federal Acquisition Regulation *Cost Principles*—

a. Costs of Preparing a Request for Equitable Adjustment Are Unallowable.—Federal Acquisition Regulation 31.205-47(f) disallows costs incurred in connection with the prosecution or defense of a CDA claim. In *Marine Hydraulics International, Inc.*,[1082] the ASBCA disallowed the contractor's costs of preparing a Request for Equitable Adjustment (REA) because it found that the costs were not incurred "in connection with contract administration or performance." The board reasoned that the contractor could not have incurred the REA costs in connection with contract performance because the contractor had completed performance before it prepared the REA. The board also determined that the REA was not an element of contract administration because contract administration "normally involves 'the parties . . . working together,'"[1083] and the costs included in the REA were in dispute for several months.

b. Interest on Back Taxes Are Unallowable as Interest on Borrowings.—As a result of an IRS audit, Lockheed Corporation was required to pay back taxes and interest to the state of California.[1084] Lockheed allocated these expenses to several government cost-reimbursement contracts through its residual expense pool; however, the contracting officer found the costs unallowable as interest on borrowings.[1085] The board denied the contractor's appeal, reasoning that the failure to pay taxes was no different than an intentional borrowing of funds and should be treated the same for allowability purposes. Two judges dissented, arguing that Lockheed did not intend to "borrow" money when it inadvertently underpaid its taxes, and the resulting interest expense is not within the scope of the cost principle establishing unallowability.

c. Allowability of Qui Tam *Defense Costs.*—The DCAA issued guidance clarifying when a contractor's costs of defending a *qui tam* action are allowable.[1086] The guidance states that, if the government intervenes in the relator's *qui tam* suit, then the suit becomes a government action, and the associated costs would be unallowable.[1087] If the government does not intervene in the relator's suit, however, then these costs may be allowable under *FAR* 31.205-33 (Professional and Consultant Costs) and *FAR* 31.201-3 (Reasonableness). The guidance further states that "the test for determining whether litigation costs are reasonable and allowable is whether the litigation arose from a willful *and* malicious violation of contract terms."[1088] Thus, according to the guidance, if the government has not intervened in the suit, the contractor's cost of defending the actions are allowable, absent a "willful and malicious" violation.[1089]

3. Contractor Not Entitled to Recovery of G&A Costs Exceeding Contract Ceiling—The Limitation of Funds (LOF) clause[1090] states that "the Government is not obligated to reimburse the Contractor for costs incurred in excess of the total amount allotted by the Government" to the contract.[1091] In *GKS, Inc.*,[1092] the G&A rate negotiated by the government and GKS was ten percent, based on GKS's optimistic expecta-

---

[1082] ASBCA No. 46116, 94-3 BCA ¶ 27,057.

[1083] *Id.* (quoting Coastal Drydock & Repair Corp., ASBCA No. 36754, 91-1 BCA ¶ 23,324, at 117,004).

[1084] Lockheed Corp., ASBCA No. 36910, 94-3 BCA ¶ 27,101.

[1085] The applicable clause, DAR 15-205.17, Interest and Other Financial Costs (1969), stated:

> Interest on borrowings (however represented), bond discounts, costs of financing and refinancing operations, legal and professional fees paid in connection with the preparation of prospectuses, costs of preparation and issuance of stock rights, and costs related thereto, are unallowable except for interest assessed by State or local taxing authorities under the conditions set forth in 15-205.41. (But see 15-205.24).

Federal Acquisition Regulation 31.205-20 is substantially the same. *Defense Acquisition Regulation* 15-205.41 and its modern counterpart, *FAR* 31.205-41, state that interest on back taxes is allowable if the nonpayment of tax was at the direction of a cognizant government contracting officer.

[1086] Memorandum, Assistant Director of Policy and Plans, Defense Contract Audit Agency, to Regional Directors and Directors of Field Detachments, subject: Audit Guidance on Allowability of Legal Costs Associated With *Qui Tam* Suits, 94-PAD-100(R) (June 20, 1994) [hereinafter *Qui Tam* Memorandum].

[1087] *Federal Acquisition Regulation* 31.205-47(b) states generally that costs incurred in connection with any proceeding brought against a contractor by a government entity are unallowable.

[1088] *Qui Tam* Memorandum, *supra* note 1086 (emphasis added).

[1089] This result is more generous to the contractor than required by the *FAR* sections cited by the DCAA. For example, *FAR* 31.205-33 states in relevant part: "[c]osts of professional and consultant services are allowable . . . when reasonable in relation to the services rendered . . . ." The *FAR* cost principle would permit disallowing costs if they are unreasonable. Costs may be unreasonable for a variety of reasons (*e.g.*, they exceed the customary rate, the services are extensive in nature). The DCAA guidance would allow these costs when not incurred due to "willful and malicious" violations of the contract.

[1090] FAR 52.232-22.

[1091] *Id.* 52.232-22(f)(1).

[1092] ASBCA No. 45913, 94-3 BCA ¶ 27,232.

tion of new business during the contract period. This new business failed to materialize, and a higher-than-expected G&A rate increased the contractor's costs beyond the ceiling stated in the LOF clause. GKS notified the contracting officer of the impending overrun, as required by the clause, but continued incurring costs. On completion of performance, GKS submitted a final invoice which included its actual G&A rate of 28.77% and exceeded the LOF ceiling by over $200,000. The board upheld the contracting officer's refusal to pay the excess amount because the plain language of the LOF clause limits the government's liability for costs in excess of the stated ceiling. The board also rejected GKS's argument that it was entitled to the costs because they were unforeseeable,[1093] finding that GKS failed to show that a cumulative, year-to-date account would not have alerted it to the impending overrun.

O. Environmental Law

1. Authority to Use Cost-Plus-Fixed-Fee (CPFF) Contracts for BRAC Work Expanded.—Section 101 of the FY 1995 MILCON Appropriations Act prohibits expenditure of MILCON funds under CPFF contracts over $25,000 without "the specific approval in writing of the Secretary of Defense."[1094] Although the BRAC account is under the MILCON Appropriations Act, agencies were using CPFF contracts for BRAC contracts without obtaining the required approval.[1095] The DOD Principle Deputy Comptroller considers this practice a violation of the Antideficiency Act.[1096] To avoid future antideficiency violations and alleviate the approval bottleneck, the authority to approve MILCON funded BRAC contracts has been delegated to Army Heads of Contracting Activities.[1097] This authority may be redelegated to a level no lower than the chief of a contracting office.[1098]

2. DCAA/DCMC Clarify 1992 Guidance Concerning Allowability of Environmental Costs.—On April 13, 1994, the DCAA and the DCMC jointly addressed questions arising from guidance issued by the DCAA on October 14, 1992. The DCAA/DCMC Guidance (guidance) states, inter alia, that an environmental violation (which would render associated costs unallowable), may be established without a formal citation by a government agency.[1099] Concerning allocability of costs, the guidance states that contractors should expense costs to remediate property which was not contaminated when acquired by the contractor.[1100] However, costs to remediate property that was contaminated when acquired by the contractor should be capitalized as an improvement, rather than expensed in a single accounting period.[1101] Finally, if a contractor incurs costs as a Potentially Responsible Party (PRP) but cannot collect from another PRP because it no longer exists, such costs are not unallowable "bad debts" under *FAR* 32.205-3.[1102]

[1093] In General Elec. Co. v. United States, 440 F.2d 420 (Ct. Cl. 1971), the court determined that the contractor was entitled to reimbursement for costs in excess of a similar ceiling because the overrun was attributable to excessive final indirect cost rates that the contractor could not have reasonably foreseen. *See also* International Bus. Assocs., ASBCA No. 46362, 94-3 BCA ¶ 27,129 (denying contractor recovery because overrun was foreseeable).

[1094] *See supra* note 282 and accompanying text. Prior MILCON Acts included substantially the same restriction. *See, e.g.*, Military Construction Appropriations Act of 1994, Pub. L. No. 103-110, § 101, 107 Stat. 1037, 1041 (1993).

[1095] Memorandum, Assistant Secretary of the Army for Research, Development, and Acquisition, Pentagon, to All Army Contracting Activities, subject: Delegation of Authority to Approve Certain Cost-Plus-Fixed-Fee Contracts Funded With Military Construction/BRAC Appropriations (4 Aug. 1994).

[1096] *Id.* The OSD General Counsel has advised that the OSD will not ratify obligations and expenditures made in violation of § 101 of the MILCON appropriations acts.

[1097] Letter, Secretary of the Army, SARDA 94-5, subject: Delegation of Authority to Approve Certain Cost Contracts Funded With Military Construction Appropriations (June 30, 1994).

[1098] *Id.*

[1099] Memorandum, Robert P. Scott, Executive Director, Contract Management, and Michael J. Thibault, Assistant Director, Policy & Plans, subject: Guidance Addressing Questions Raised Related to the 14 October 1992 Guidance Paper on Environmental Costs (Apr. 13, 1992) [hereinafter DCAA/DCMC Guidance]. Under the joint guidance, an agency may establish a violation if review of the available records and other information discloses that the environmental damage occurred because the contractor's practices were inconsistent with the actions expected of a reasonable, prudent businessperson performing nongovernment contracts.

[1100] In this situation, the DCAA and DCMC consider the remediation costs as repair and maintenance costs which, under CAS 404, should be expensed.

[1101] Some examples of costs to be capitalized include: the cost of a feasibility study, remediation project management fees, actual remediation costs, and the cost of equipment purchased to accomplish the remediation.

[1102] The 1992 guidance stated that "[i]f a contractor cannot collect contribution or subrogation from other PRPs, the uncollected amounts are, in their essential nature, bad debts," and, therefore, unallowable under *FAR* 32.205-3. The Director of Defense Procurement determined, however, that if there is no longer an ongoing business from which to collect, monies owed by that business cannot be characterized as a "bad debt." *See* Memorandum, Director of Defense Procurement, for DCMC Acting Executive Director, subject: Allowability of Environmental Cleanup Costs Attributable to Other PRPs (8 Feb. 1994). As a result of the Director's memorandum, these costs are now allowable.

P. Payment and Collection

1. Prompt Payment Act (PPA).[1103]—*a. Failure to Notify Contractor of Defective Invoice Shortens Due Date.*—The PPA requires the government to pay interest when it fails to pay a proper contractor invoice within thirty days.[1104] If the contractor submits a defective invoice, the government must notify the contractor within seven calendar days.[1105] In *Technocratica*,[1106] the board considered the consequences of the government's failure to provide the required notice. If the government fails to notify the contractor that the invoice is defective by the seventh day, the payment due date after receipt of a corrected invoice is reduced one day for each day after the seventh day that the government failed to notify the contractor of the defect.[1107] If the government fails to notify the contractor at all, the defective invoice will be treated as a "proper invoice" as of the day the agency received it.

b. Theft of Government Check Results in Payment of PPA Interest.—In *Sun Eagle Corp.*,[1108] the government placed two progress payment checks in a sealed, properly addressed envelope before the due date. An independent courier stole the checks before they were mailed, and the contractor did not receive payment until the government issued replacement checks several months later. The board sustained the contractor's claim for PPA interest, even though the checks were dated and dispatched before the due date.[1109] The board determined that the purpose of the PPA was to ensure that government contractors received payment in a timely manner, and held that the risk of nondelivery "remained with the Government who trusted the courier service with the checks."[1110]

c. The PPA Applies Worldwide.—On March 10, 1994, the CAA and DAR Councils amended the *FAR* to make the PPA applicable worldwide.[1111] The Councils made this change to comply with a 1992 ASBCA decision which held that *FAR* 32.901 improperly excluded from PPA coverage contracts awarded to foreign firms for work performed outside the United States.[1112]

2. Prompt Payment Discounts on Progress Payments.—In *Jay Dee Militarywear, Inc.*,[1113] the government made progress payments prior to accepting end items. The contract included the standard Discounts clause[1114] and the contractor had authorized the government to take a discount on payments made within twenty days of acceptance. After the government accepted the end items, the contracting officer took a discount for the previously made progress payments, paying the contractor the balance. In several instances, this balance was paid after the discount period. The board held that the government was entitled to the discount on the progress payments because it met the only precondition: payment within the discount period.[1115]

3. Federal Acquisition Regulation Provision Does Not Affect Contractor's Right to Payment.—*Federal Acquisition Regulation* 28.106-7 requires a contracting officer to withhold final payment from a contractor on receiving notice from a surety that the contractor has failed to pay its subcontractors.[1116] In *George Bernadot & Co.*,[1117] the surety provided

---

[1103] 31 U.S.C. §§ 3901-3906, *amended by* The Prompt Payment Act Amendments of 1988, Pub. L. No. 100-496, 102 Stat. 2455. On May 6, 1994, the CAA and DAR Councils proposed substantial changes to *FAR* provisions and clauses pertaining to the PPA. *See* 59 Fed. Reg. 23,776 (1994). The proposed amendments are in response to the 1988 PPA amendments and the resultant 1989 revisions to *OMB Circular A-125*.

[1104] 31 U.S.C. § 3903(a). *See also* FAR 32.902; 32.905(e).

[1105] FAR 32.905(e).

[1106] ASBCA No. 44347, 94-1 BCA ¶ 26,584.

[1107] *See* FAR 32.907-1(b).

[1108] ASBCA No. 45985, 94-1 BCA ¶ 26,425.

[1109] *See* 31 U.S.C. § 3901(a)(5) (stating that, for PPA purposes, "a payment is deemed to be made on the date a check for the payment is dated").

[1110] *Sun Eagle Corp.*, 94-1 BCA ¶ 26,425, at 131,464.

[1111] FAC 90-20, 59 Fed. Reg. 11,379 (1994) (amending *FAR* 32.901, 52.232-25, 52.232-26, and 52.232-27).

[1112] Held and Franke Baukittengesellschaft, ASBCA No. 42463, 92-1 BCA ¶ 24,712.

[1113] ASBCA No. 46539, 94-2 BCA ¶ 26,829.

[1114] FAR 52.232-8, Discounts for Prompt Payment.

[1115] For a more detailed discussion of this decision, *see* Contract Law Div. Note, *Prompt Payment Discounts on Progress Payments*, ARMY LAW., Aug. 1994, at 54.

[1116] *Federal Acquisition Regulation* 28.106-7(b) states in relevant part: "If, after completion of the contract work, the Government receives written notice from the surety regarding the contractor's failure to meet its obligation to its subcontractors or suppliers, the contracting officer shall withhold final payment."

[1117] ASBCA No. 42943, 94-3 BCA ¶ 27,242.

the required notice, the contracting officer withheld final payment, and the contractor submitted a claim for the withheld funds. The board upheld the claim, because the *FAR* provision was not included in the contract. The board reasoned that a "regulation addressed to the contracting officer which appears to require a certain action does not mean that the action is permitted under the contract."[1118]

4. Retainage Provision in Supply Contract Unauthorized.—A nonstandard clause in a supply contract authorized the government to retain twenty percent of the contract price of end items it received from the contractor until satisfactory completion of installation and field testing.[1119] Relying on the clause, the contracting officer retained twenty percent of the contract price of each item delivered. The board sustained the contractor's appeal, finding that the nonstandard clause conflicted with the standard Payments clause,[1120] and that the government had not obtained a deviation. The board rejected the government's argument that the retainage was an authorized "deduction" under the Payments clause.

5. Board Upholds Progress Payment Reduction Pursuant to Unpublished Clause.—In *Mallory Electric Co.*,[1121] the government withheld twenty percent of a progress payment based on an internal policy memorandum that allowed for such withholding until the government could test mechanical and electric equipment delivered to the site. The government released the withheld amount after it tested and approved the equipment, but the contractor filed a claim for financing costs allegedly incurred during the withholding period. The contractor contended that the withholding rule was unreasonable and constituted an abuse of the contracting officer's discretion. The board rejected this argument, noting that the standard Fixed-Price Construction Payments clause[1122] allows the contracting officer to "consider" the value of materials stored at the site, but does not require such consideration. Because the contracting officer was not required to consider the cost of such material, his considering and paying eighty percent of it was within his discretion.

VII. Fiscal Law

A. Purpose

1. Appropriations Act Does Not Confer Entitlement on Contractor Notwithstanding Committee Reports to the Contrary.—In *Recording for the Blind, Inc. v. Department of Education*,[1123] the contracting officer reduced the contract price by $17,953 after an audit revealed that the Department of Education (DOE) had overpaid the contractor. On appeal, the contractor argued that the DOE's action was improper, because Congress had specifically appropriated funds to the DOE for the use and benefit of the contractor. To support its argument, the contractor cited Appropriations Committee reports that indicated Congress intended the DOE to use funds for a "grant" to the contractor. The board denied the appeal, finding that the appropriations acts in question did not even mention the contractor, and thus did not give the contractor a "special, legal right to public moneys."[1124] The board noted that an agency's failure to abide by expressions of intent in committee reports "risks only strained relations with the appropriators," but does not violate appropriations laws.[1125]

2. Necessary and Incident Expenses—

a. Agencies May Pay for Environmental Licenses.—Agencies generally may not use appropriated funds to pay employees' fees incident to obtaining licenses or certificates.[1126] The GAO carved out an exception to this longstanding rule, however, and determined that the Air Force could use appropriated funds to pay for employees' licenses or certificates when necessary to comply with state-established environmental standards.[1127] The GAO reasoned that the Air

---

[1118] *Id.* at *15.

[1119] Revere Elec. Supply Co., ASBCA No. 46413, 94-___ BCA ¶ ____, 1994 ASBCA LEXIS 119 (Apr. 15, 1994).

[1120] FAR 52.232-1 (providing that the government shall pay the contractor, on submission of proper invoices or vouchers, the prices stipulated in the contract for supplies delivered and accepted or services rendered and accepted, less any deductions provided for in the contract).

[1121] ASBCA No. 41399, 94-2 BCA ¶ 26,841.

[1122] FAR 52.232-5.

[1123] GSBCA No. 12391-ED, 94-2 BCA ¶ 26,820.

[1124] *Id.* at 133,382.

[1125] *Id. Accord* To the Honorable Lowell Weiker, Jr., B-217722, 64 Comp. Gen. 359 (1985).

[1126] *See, e.g.*, Dr. M. E. Kaye—Reimbursement of Registration Fee and Per Diem Expenses, B-210522, 1983 U.S. Comp. Gen. LEXIS 76 (Dec. 15, 1983) (prohibiting agency from using appropriated funds for employee's continuing medical education needed to retain medical license and board certification); To A. N. Ross, B-29948, 22 Comp. Gen. 460 (prohibiting agency from using appropriated funds for attorney's admission to 10th Circuit Court of Appeals).

[1127] Air Force—Appropriations—Reimbursement for Costs of Licenses or Certificates, B-252467, June 3, 1994, 73 Comp. Gen. ____.

Force received the primary benefit of the required licenses, and that any benefit to the employees was "nominal and incidental to the performance of their official duties."[1128] Lest attorneys get any crazy ideas, however, the GAO concluded that appropriated funds remain unavailable to pay for the licensing requirements of professional personnel, including lawyers, doctors, teachers, accountants, and engineers.

b. Keeping Fit at Government Expense?—Agencies may establish a health service program to promote and maintain employees' mental and physical fitness.[1129] Pursuant to this authority, the GAO has determined that the National Transportation Safety Board (NTSB) may use appropriated funds to reimburse investigators for the cost of physical examinations performed by FAA certified private physicians.[1130] The GAO reasoned that the government receives the primary benefit when investigators maintain the medical certification provided by the examination, because the certificates provide the NTSB with some assurance that the investigators can successfully meet the physical demands of their employment.

Nevertheless, there are limits on how far an agency can go in promoting physical fitness. In *Department of Energy—Payment of Registration Fees for Competitive Fitness and Sports Activities*,[1131] the GAO concluded that agencies may not use appropriated funds to pay employees' registration fees for participating in competitive fitness or sporting events. The GAO found such fees to be personal rather than official, and not an essential part of a health service program within the meaning of 5 U.S.C. § 7901.

B. Time

The GAO Attempts to Clarify Distinction Between "Severable" and "Nonseverable" Service Contracts.—In *Incremental Funding of U.S. Fish and Wildlife Service Research Work Orders*,[1132] the GAO attempted to simplify the sometimes confusing distinction between "severable" and "nonseverable" service contracts.[1133] The Fish and Wildlife Service's incrementally funded research work orders with annual appropriations. In holding that this practice was improper, the GAO defined a "severable" task as a task "that can be separated into components that independently meet a separate need of the government." On the other hand, a "nonseverable" task is a "specific, entire job with a defined end-product that cannot feasibly be subdivided for separate performance in each fiscal year." Examining the work orders under these definitions, the GAO concluded that the work orders were nonseverable tasks that the Fish and Wildlife Service should have fully funded at contract award.

C. Antideficiency Act

1. An Insufficient Expired Account Balance Does Not Excuse Agency from Duty to Record Obligation.—In FYs 1990 and 1991, the United States Arms Control and Disarmament Agency (ACDA) charged employee overtime to its operations account, although the overtime was associated solely with official reception and representation events.[1134] The IG for ACDA subsequently determined that the expense should have been charged to the now-expired reception and representation (R&R) account, and directed ACDA to adjust its accounts accordingly. Recognizing that this adjustment would result in overobligation of the R&R account, ACDA questioned the need to make the adjustment. The GAO held that ACDA had to correct the improper obligation of operations funds, even though the overobligation was unintentional, and despite the possibility of disclosing an ADA[1135] violation.

2. Charging a New Obligation to an Expired Account Does Not Violate the ADA.—In *Farmers Home Administration*[1136] (FMHA), the agency issued a delivery order on June 28, 1991, citing FY 1990 funds, for office chairs to be delivered in FY 1992. On learning that the cognizant IG considered this

---

[1128] *Id.* The GAO noted, for example, that South Carolina requires an "Asbestos Abatement License" that costs $300 per year, Texas requires a "Water Treatment Foreman's License" that costs $80 every three years, and North Carolina requires a "Pesticide and Herbicide License" that costs $523 every three years.

[1129] 5 U.S.C. § 7901.

[1130] National Transp. Safety Board—Physical Examinations for Air Safety Investigators, B-256092, July 6, 1994, 73 Comp. Gen. ____.

[1131] B-256194, June 1, 1994, 73 Comp. Gen. ____.

[1132] B-240264, 73 Comp. Gen. ____.

[1133] The significance is that agencies must fund severable service contracts with funds current when the services are performed, and must fund nonseverable service contracts with funds current at contract award, even though performance may extend into a subsequent fiscal year. *See* Contract Law Div. Note, *Funding of Service Contracts: The GAO Clarifies the Rules*, ARMY LAW., Sept. 1994, at 34.

[1134] Adjustment of Expired and Closed Accounts, B-253623, Sept. 28, 1994, 73 Comp. Gen. ____.

[1135] The so-called "Antideficiency Act" is actually several statutes enacted over a 124-year period. The current statutory sections are located at 31 U.S.C. §§ 1341 (prohibiting obligations or expenditures in excess of appropriations and contracting in advance of an appropriation); 1342 (prohibiting government employees from accepting voluntary services); 1511-1517 (requiring apportionment/administrative subdivision of funds and prohibiting obligations or expenditures in excess of apportionment or administrative subdivision of funds). 31 U.S.C. § 1341 states in relevant part: "An officer or employee of the United States Government . . . may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation."

[1136] B-251706, Aug. 17, 1994, 73 Comp. Gen. ____.

arrangement a violation of the ADA, FMHA modified the delivery order on December 26, 1991, to charge FY 1991 funds for the chairs. The FMHA General Counsel determined that FMHA committed two ADA violations. First, FMHA exceeded the "amount available" in an appropriation when it incurred a new obligation (*i.e.*, the June 1991 delivery order) citing an expired appropriation (the FY 1990 appropriation).[1137] Second, FMHA made an obligation "in advance of" an appropriation when it issued a delivery order in FY 1991 for chairs to be delivered in FY 1992.[1138] The GAO disagreed, finding that FMHA did not exceed an amount available in an appropriation because there were sufficient FY 1991 funds available for obligation after deobligating the FY 1990 funds. Further, the GAO found that FMHA did not obligate in advance of an appropriation because FMHA had a continuing, bona fide need for the chairs in FY 1992, and FMHA had to delay delivery due to constant revisions of its renovation plans.

D. Intragovernmental Acquisitions

1. Secretary of Defense Restricts the DOD's Use of Economy Act.—Last year, Congress required the DOD to prescribe regulations governing the DOD's use of the Economy Act[1139] to acquire goods and services through contracts administered by other federal agencies.[1140] On February 8, 1994, the Secretary of Defense issued a memorandum directing that, before an Economy Act order is placed outside the DOD for contracting action, the head of the ordering agency or designee must determine that:

> the ordered supplies or services cannot be provided as conveniently and cheaply by contracting directly with a private source;
>
> the servicing agency has unique expertise or ability not available within the DOD; and
>
> the supplies or services clearly are in the scope of activities of the servicing agency and that agency normally contracts for those supplies or services for itself.[1141]

The directive permits the agency head to delegate authority to make the determination to a level no lower than a Senior Executive Service (SES), flag officer, or general officer of the ordering activity, so long as the servicing agency is required to comply with the *FAR*. For servicing agencies not required to comply with the *FAR*, the relevant Senior Procurement Executive must approve the determination.

2. The DOD Toes the Line—Responding to the Secretary's memorandum, the Director of Defense Procurement amended the *DFARS* to establish an advisory role for the contracting officer in the approval of Economy Act orders.[1142] Also, the DOD Comptroller directed that DOD accounting officers are responsible for ensuring that a documented "determination and finding" statement is prepared prior to committing and obligating funds on Economy Act orders placed outside the DOD.[1143] The Assistant Secretary of the Army (Research, Development, and Acquisition) delegated authority, without power of redelegation, to approve Economy Act determinations for contract action by non-DOD agencies to general officer or SES commanders or directors of ordering agencies.[1144] Thereafter, the Director for Procurement Policy, Department of the Army, directed that Economy Act determinations "shall be prepared in Determination and Findings (D&F) format," and provided a sample Economy Act D&F.[1145] The Director further ordered all such D&Fs to be reviewed by counsel and

---

[1137] *See* 1 UNITED STATES GENERAL ACCOUNTING OFFICE, OFFICE OF THE GENERAL COUNSEL, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 5-4 (2d ed. 1991) (stating that if an agency "fails to obligate its annual funds by the end of the fiscal year for which they were appropriated, they cease to be available for obligation").

[1138] *See* 31 U.S.C. § 1341(a)(1)(B) (providing that an officer or employee of the United States may not "involve the government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law"); To the Secretary of the Army, B-115736, 33 Comp. Gen. 57 (1953); Chairman, United States Atomic Energy Comm'n, B-130815, 37 Comp. Gen. 155 (1957); Betty F. Leatherman, Dep't of Commerce, B-156161, 44 Comp. Gen. 695 (1965); To Administrator, Small Business Admin., B-155876, 44 Comp. Gen. 399 (1965).

[1139] 31 U.S.C. § 1535.

[1140] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 844, 107 Stat. 1547, 1720-21 (1993).

[1141] Memorandum, Secretary of Defense, to Secretaries of the Military Departments, subject: Use of Orders Under the Economy Act (8 Feb. 1994).

[1142] 59 Fed. Reg. 22,759 (1994) (effective April 25, 1994, amending *DFARS* 217.502, and providing that the contracting officer who normally would contract for the requesting activity should advise in the determination process "if requested"). Prior to this amendment, the contracting officer was the agency head designee in the DOD for Economy Act determinations.

[1143] Memorandum, DOD Comptroller, to Secretaries of the Military Departments, subject: Accounting Officer Responsibility for Economy Act Orders (21 Apr. 1994).

[1144] Department of the Army Letter, Assistant Secretary (Research, Development & Acquisition), SARDA-94-6, subject: Delegation of Authority to Approve Determinations to Use the Economy Act (29 June 1994). *See also* DEP'T OF AIR FORCE, AIR FORCE FED. ACQUISITION REG. SUPP. 5317.503-90(a) (Jan. 1, 1992) [hereinafter AFFARS] (delegating Economy Act approval authority to a level no lower than SES/flag/general officer in the ordering activity's chain of command).

[1145] Memorandum, Department of the Army, United States Army Contracting Support Agency, SFRD-KP, subject: Acquisition Letter 94-5, Economy Act Orders Outside DOD (4 Aug. 1994) [hereinafter Economy Act Orders Outside DOD Memorandum]. *See also* AFFARS 5317.503-90 (Model Determination and Findings).

coordinated with the requiring activity's supporting Army contracting office prior to execution.[1146]

E. Continuing Resolution Authority (CRA)

1. "Once in a Blue Moon"—Timely Action by Both Congress and the President Avoid Necessity for the CRA.—For only the third time since 1948, both the legislative and executive branches completed the appropriations process before the end of the fiscal year.[1147] During the final days of September, President Clinton signed the last eight of thirteen appropriations bills. In previous years, congressional-presidential disputes regarding the content of appropriations bills have delayed passage of that authority necessary for agencies to expend public funds—resulting in either funding gaps or the passage of continuing resolutions. The previous two occasions on which Congress timely passed appropriations occurred in 1976 and 1988.[1148]

2. The CRA Allows Obligation of Seventy-five Percent of Funds Appropriated by Congress.—At issue in *Harold Rogers*,[1149] was the Clinton Administration's apportionment and obligation of funds for payments to the United Nations under the authority of a 1994 continuing resolution. During the CRA time frame, the Administration apportioned and obligated approximately seventy-five percent of the funds available under the resolution for peacekeeping activities. After reviewing the amount available[1150] under the CRA and the agency's historic rate of obligation in recent years,[1151] the GAO found that the Administration's actions complied with the provisions of the CRA and laws governing the apportionment of appropriated funds.

F. Liability of Accountable Officers

Reasonable Diligence Found in Certifying Payment to Wrong Contractor—The GAO may relieve a certifying officer of liability associated with an incorrect payment if the underlying certification is based on official records and the officer could not, by reasonable diligence, have discovered correct information.[1152] In *Dr. Neal F. Lane*,[1153] a certifying officer at the National Science Foundation (NSF) certified payment of $115,691 to the wrong contractor. Following an investigation, the agency determined the erroneous payment occurred because a program manager incorrectly recorded the institution code of another contractor for entry into NSF's computerized payment system. The agency stated that, because the certifying officer routinely processed between 3000 to 4000 payments per month, the officer was allowed to rely on the automated system and the clerical personnel who processed the individual transactions. The GAO noted that once the agency discovered the error, it immediately took steps to collect the erroneously paid funds—to include notifying the local United States Attorney's Office. In light of the high volume of monthly payments, the GAO concluded that it would be unreasonable to require the certifying officer to examine the supporting information for each individual payment when making his certification, and granted the relief requested. As an epilogue, the GAO commended the NSF for revising its certification procedures so as to eliminate the possibility of such an error occurring in the future.

G. Revolving Funds—Long Live the DBOF!

The National Defense Authorization Act for FY 1995 removed the DBOF's sunset provision, firmly establishing it within the DOD for the foreseeable future.[1154] The DBOF continues to pursue the vision and operating goals announced in last year's DBOF Improvement Plan,[1155] and apparently its progress to date has been adequate to satisfy congressional concerns.[1156]

The DOD Comptroller's Office recently issued additional guidance on DBOF operations.[1157] One of the subjects

---

[1146] *See* Economy Act Orders Outside DOD Memorandum, *supra* note 1145.

[1147] *1995 Federal Spending Bills: Rare On-time Passage for Appropriations*, FACTS ON FILE WORLD NEWS DIGEST, Oct. 13, 1994, at 756 C2.

[1148] *Id.*

[1149] B-255529, 72 Comp. Gen. ____.

[1150] The amount available is known as the "current rate."

[1151] The GAO specifically noted that the agency (Department of State) historically obligated the bulk of its appropriated peacekeeping funds during the first quarter of the fiscal year.

[1152] 31 U.S.C. § 3528(b)(1)(A).

[1153] B-254218, 72 Comp. Gen. ____.

[1154] Pub. L. No. 103-337, § 311(a), 108 Stat. 2663 (1994); *see supra* note 193 and accompanying text.

[1155] DIRECTORATE FOR BUS. MGMT. (COMPTROLLER), DEPARTMENT OF DEFENSE, DEFENSE BUSINESS OPERATIONS FUND IMPROVEMENT PLAN (Sept. 24, 1993).

[1156] *See* H.R. REP. No. 357, 103d Cong., 1st Sess. 653 (1993).

[1157] Memorandum, Deputy Comptroller (Financial Systems), Department of Defense, subject: Defense Business Operations Fund Approved Policies (17 Oct. 1994) [hereinafter Comptroller Memorandum].

addressed was cash management, an area of particular concern to the DOD Comptroller's Office, because it has retained Antideficiency Act controls at its level.[1158] Under the new guidelines, the Deputy Comptroller (Program/Budget) develops overall cash plans, monitors cash levels, and establishes procedures to correct short-term cash shortages; the Defense Finance and Accounting Service (DFAS) provides cash reports by component and business area, ensures that collections and disbursements are consistent with policy, and takes corrective action to resolve cash shortages; and the components establish cash plans based on their approved budgets, correct operational problems contributing to cash management problems, and work with the DFAS to correct finance and accounting problems that contribute to deviations from the cash plan.[1159] Whether these clarifications of responsibilities will improve DBOF cash management remains to be seen, but it appears to be a step in the right direction.[1160] Congress will no doubt continue to scrutinize DBOF operations closely to ensure continued improvement.[1161]

H. Construction Funding

1. Army Revises Construction Funding Regulation.— Although it does not make any major changes to the rules governing construction funding, last year the Army consolidated several separate regulations providing guidance on the funding of construction projects into a single regulation.[1162] One notable change in the regulation is a revised definition of construction, as it relates to existing facilities: the term "construction" now includes acquisition of existing facilities,[1163] as well as expansions, alterations, conversions, and replacements of facilities that the Army already owns.[1164]

2. Bidder's Offer to Complete Project Early Does Not Equal the Prohibited Expediting of a Construction Contract.—The Military Construction Codification Act of 1982[1165] prohibits the expenditure of military construction funds to expedite construction at "additional costs," unless the service secretary certifies that the additional costs are necessary to protect the national interest, and that the expedited performance period is reasonable.[1166] Recently a disappointed bidder used this restriction to challenge the award of a Corps of Engineers contract to an offeror proposing to complete a project in 100 fewer days than the protester, but at a cost $738,000 higher.[1167] The Corps evaluated the bid, as disclosed in the IFB, using an evaluated total cost methodology, which took into account other savings to the government that would result from early project completion. Under the Corps' evaluation, the awardee's bid was adjusted to an amount $358,000 lower than the protester's adjusted cost. The government argued that the statutory prohibition against spending military construction funds to expedite construction contracts without secretarial approval applies only to government accelerations of existing performance periods; that expediting does not occur when an offeror proposes a shorter performance period than other bidders; and that the Corps therefore had awarded the contract lawfully. The GAO found this interpretation reasonable, and denied the protest.

VIII. Conclusion

1994 brought significant changes to federal procurement law. Although not as far reaching as many had hoped, the FASA provides a first step towards meaningful reform, particularly in its provisions for commercial item procurements and simplified acquisition procedures. As with all areas of the law, however, many uncertainties remain, such as the dispute requirement prior to submission of CDA claims. We have attempted to provide readers with the most important developments occurring throughout the broad field of federal procurement, while recognizing that our efforts could never do justice to the myriad issues confronting practitioners daily.

[1158] That is, the DOD Comptroller has not formally subdivided DBOF funds to the military services or to the defense agencies. *See* 31 U.S.C. §§ 1511-1517.

[1159] *See* Comptroller Memorandum, *supra* note 1157, attachment 1.

[1160] *Cf.* UNITED STATES GENERAL ACCOUNTING OFFICE, FINANCIAL MANAGEMENT: STATUS OF THE DEFENSE BUSINESS OPERATIONS FUND 6, B-249045, GAO/AIMD-94-80 (Mar. 9, 1994) (noting DBOF cash management problems and the need for better fund policies and procedures).

[1161] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 332, 107 Stat. 1547, 1620-21 (1993) (directing the General Accounting Office to oversee DBOF operations).

[1162] DEP'T OF ARMY, REG. 415-15, ARMY MILITARY CONSTRUCTION PROGRAM DEVELOPMENT AND EXECUTION (30 Aug. 1994) [hereinafter AR 415-15] (superseding AR 415-15 (Dec. 1, 1983), AR 415-10 (Mar. 1, 1984), AR 415-13 (Apr. 1, 1984), AR 415-20 (Mar. 28, 1974), AR 415-35 (Sept. 15, 1983)).

[1163] *See* Military Construction Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 2805, 107 Stat. 1856, 1886-87 (1993) (codified in 10 U.S.C. § 2813; authorizing service secretaries to acquire existing facilities and the real estate on which they are located in lieu of building new structures for projects authorized by Congress).

[1164] AR 415-15, *supra* note 1162, glossary, sec. II, Terms.

[1165] 10 U.S.C. §§ 2801-2866.

[1166] *Id.* § 2858.

[1167] *Cedar Valley Corp.*, B-256556, July 5, 1994, 94-2 CPD ¶ 7.

We remain hopeful that the reform-minded members of the 104th Congress and the Clinton Administration will view the Federal Acquisition Streamlining Act as a beginning—a start in the direction of a complete overhaul in how the government procures its goods and services. We expect to see a shift in budget priorities in 1995, with force readiness issues coming to the forefront. We will, as always, continue to monitor the many important developments in the law, so that we may present a thoughtful and comprehensive Year in Review for 1995.

USALSA Report

United States Army Legal Services Agency

Clerk of Court Notes

Courts-Martial Processing Times

The tables below reflect the average pretrial and posttrial processing times of general, special, and summary courts-martial for the Fiscal Years (FY) 1991 through 1994.

General Courts-Martial

	FY 1991	FY 1992	FY 1993	FY 1994
Records received by Clerk of Court	1114	1156	1035	789
Days from charging or restraint to sentence	46	53	54	53
Days from sentence to action	62	72	66	70
Days from action to dispatch	7	9	7	8
Days en route to Clerk of Court	10	11	8	9

BCD Special Courts-Martial

	FY 1991	FY 1992	FY 1993	FY 1994
Records received by Clerk of Court	350	316	174	150
Days from charging or restraint to sentence	33	42	38	37
Days from sentence to action	53	61	59	58
Days from action to dispatch	6	6	7	7
Days en route to Clerk of Court	9	8	7	9

Non-BCD Special Courts-Martial

	FY 1991	FY 1992	FY 1993	FY 1994
Records reviewed by SJA	174	104	65	53
Days from charging or restraint to sentence	35	42	35	33
Days from sentence to action	43	40	25	28

Summary Courts-Martial

	FY 1991	FY 1992	FY 1993	FY 1994
Records reviewed by SJA	903	739	353	335
Days from charging or restraint to sentence	12	15	14	14
Days from sentence to action	8	8	8	8

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Legal Assistance Items

Tax Note

Internal Revenue Service (IRS) Guidance on Military Moving Allowances

As you know by now, beginning in 1994 moving expenses became an adjustment to gross income.[1] Consequently, taxpayers may reduce their gross income by any 1994 qualified moving expenses without itemizing deductions on *Form 1040, Schedule A*.[2]

Previously, the IRS recognized some confusion over the tax status of certain military allowances (*e.g.*, temporary lodging allowance (TLA), temporary lodging expense (TLE), dislocation allowance (DLA), and moving-in housing allowance (MIHA)).[3] Recently, the IRS published guidance which indicates that the IRS intends to treat these allowances as "subsis-

---

[1] I.R.C. §§ 62(a)(15), 217 (RIA 1994); *see* TJAGSA Practice Note, *Tax Update for 1994 Federal Income Tax Returns*, ARMY LAW., Nov. 1994, at 44.

[2] Moving expenses are now limited to the reasonable expenses of—

(1) moving household goods and personal effects from the former residence to the new residence, and
(2) traveling (including lodging) from the former residence to the new place of residence.

This change eliminated these common moving expenses military taxpayers incur when moving: the cost of meals and lodging for premove househunting trips; temporary lodging costs (*e.g.*, meals and lodging for a brief time at the new location before settling into the new residence); costs incident to sale (or lease) of the old residence; and costs incident to purchase (or lease) of a new residence. Consequently, few military taxpayers now have any moving expenses that qualify for the new adjustment to gross income.

[3] *See* TJAGSA Practice Note, *Moving Expense Allowances Not Taxable*, ARMY LAW., Aug. 1994, at 60. This note reprinted Message, Headquarters, Dep't of Army, DAJA-LA, subject: Moving Expense Allowances Not Taxable (021614Z Jun 94). This message incorporated information announced by the IRS in IRS Notice 94-59, 1994-1 C.B. 371, 1994 WL 191325; *see also* TJAGSA Practice Note, *The 1994 Moving Expense* Adjustment?, ARMY LAW., Apr. 1994, at 48.

tence or quarters allowances."[4] The following temporary regulation, Treasury Regulation section 1.61-22T, implements the IRS determination:

> Compensation for services, including fees, commissions, and similar items received after December 31, 1993, by members of the Armed Forces, National Oceanic and Atmospheric Administration, and Public Health Service (temporary).
>
> For purposes of § 1.61-2(b) (regarding certain allowances and other items provided to members of the Armed Forces, National Oceanic and Atmospheric Administration, and Public Health Service of the United States), quarters or subsistence includes the following allowances for expenses incurred by members of the Armed Forces after December 31, 1993, to the extent that the allowances are not otherwise excluded from gross income under another provision of the Internal Revenue Code: a dislocation allowance, authorized by 37 U.S.C. 407; a temporary lodging allowance, authorized by 37 U.S.C. 405; a temporary lodging expense, authorized by 37 U.S.C. 404a; and a moving-in housing allowance, authorized by 37 U.S.C. 405. No deduction is allowed under this chapter for any expenses reimbursed by such excludable allowances.[5]

This temporary regulation is effective retroactively to January 1, 1994.[6]

Military taxpayers still may claim an adjustment for *un*reimbursed moving expenses incurred in connection with a permanent change of station move if these expenses still qualify as "moving expenses" under Internal Revenue Code section 217.[7]

Before finally adopting the proposed regulations, the IRS has invited public comment on them.[8] Army legal assistance attorneys desiring to comment should submit comments to the Office of The Judge Advocate General, Legal Assistance Division, Attention: Major Webster, 2200 Army Pentagon, Room 2C463, Washington, D.C. 20310-2200. Lieutenant Colonel Hancock.

---

[4] Allowances Received by Members of the Armed Forces in Connection With Moves to New Permanent Duty Stations, T.D. 8575, 59 Fed. Reg. 65711, 1994 WL 706383 (1994). This decision announced temporary regulations excluding from gross income under I.R.C. § 61 certain military moving allowances paid to Armed Forces members in connection with a change of permanent duty station. (These temporary regulations were required because of § 13213(a)(1) of the Omnibus Budget Reconciliation Act of 1993 (OBRA 1993), 107 Stat. 473 (1993), which redefined the term moving expenses under § 217(b) of the Code). In this decision, the IRS described the affected allowances:

> (1) A dislocation allowance, intended to partially reimburse expenses (*e.g.*, lease forfeitures, temporary living charges in hotels, and breakage of household goods in transit) incurred in relocating a household;
>
> (2) A temporary lodging expense, intended to partially offset the added living expenses of temporary lodging (up to 10 days) within the United States;
>
> (3) A temporary lodging allowance, intended to help defray higher than normal living costs (for up to 60 days) outside the United States; and
>
> (4) A moving-in housing allowance, intended to defray costs (*e.g.*, rental agent fees, home-security improvements, and supplemental heating equipment) associated with occupying leased quarters outside the United States.

Subsistence allowances are excluded from gross income under Treasury Regulation § 1.61-2(b).

[5] Treas. Reg. 1.61-22T, ¶ 2.

[6] *Id.*

[7] *Id. See supra* note 2. Treasury Decision 8575 also added Temporary Regulation § 1.217-2T, Deduction for moving expenses paid or incurred in taxable years beginning after December 31, 1969 (temporary).

> (a) through (g)(5) [Reserved].
> (6) No deduction is allowed under this section for any moving or storage expense reimbursed by an allowance that is excluded from gross income.

[8] Allowances Received by Members of the Armed Forces in Connection With Moves to New Permanent Duty Stations, 59 Fed. Reg. 65739, 1994 WL 706396 (1994). Written comments must be delivered or mailed by March 21, 1995, to: CC:DOM:CORP:T:R (IA-50-94), Room 5228, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, D.C. 20044.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

Academic Year (AY) 1995 Judge Advocate Triennial Training and Judge Advocate Officer Advanced Course (Phase II)

Academic Year 1995 Judge Advocate Triennial Training (JATT) and the Judge Advocate Officer Advanced Course (JAOAC) Phase II, will be conducted at The Judge Advocate General's School in Charlottesville, Virginia, beginning 19 June 1995 and ending on 30 June 1995. Officers desiring to attend JAOAC must complete Phase I (Nonresident) portion before 20 May 1995. Any requests for exception must be made in writing to the Office of The Judge Advocate General, Guard and Reserve Affairs Division (ATTN: CPT Storey), 600 Massie Road, Charlottesville, Virginia 22903-1781. Captain Storey.

The general areas of law for AY 95 JATT will be International/Operational Law and Criminal Law. The ATRRS course numbers are as follows:

Course	*Course Number*	*Class Number*
JATT	5F-F57	095
JAOAC	5F-F55	095

The Judge Advocate General's Continuing Legal Education (On-Site) Schedule Update

Following is an updated schedule of The Judge Advocate General's CLE On-Sites. If you have any questions concerning the On-Site schedule, please direct them to the local action officer or CPT Eric G. Storey, Chief, Unit Liaison and Training Office, Guard and Reserve Affairs Division, Office of The Judge Advocate General, telephone (804) 972-6380.

THE JUDGE ADVOCATE GENERAL'S SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 95

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
18-19 Feb 95	Chicago, Il 214th LSO Holiday Inn (Holidome) 3405 Algonquin Road Rolling Meadows, IL 60008	AC GO RC GO Int'l-Ops Law Contract Law GRA Rep	MG Nardotti BG Lassart LTC Crane LTC Krump LTC Menk	MAJ Ronald C. Riley 18525 Poplar Ave. Homewood, IL 60430 (312) 443-4550
25-26 Feb 95 split training w/Denver	Salt Lake City, UT 87th LSO Olympus Hotel 6000 Third Street Salt Lake City, UT 84114	AC GO RC GO Crim Law Ad & Civ GRA Rep	BG Magers BG Sagsveen MAJ Barto LTC Pearson LTC Hamilton	LTC Edward O. Ogilvie 1584 East Parkridge Dr. Salt Lake City, UT 84121 (801) 575-1650
25-26 Feb 95	Denver, CO 87th LSO Fitzsimons AMC, Bldg 820 Aurora, CO 80045-7050	AC GO RC GO Crim Law Ad & Civ GRA Rep	 BG Lassart MAJ Barto LTC Pearson COL Reyna	LTC Karl E. Hansen P.O. Box 6124 Aurora, CO 80045-6124 (303) 361-1208
4-5 Mar 95	Columbia, SC 120th ARCOM Univ of SC Law School Columbia, SC 29208	AC GO RC GO Crim Law Ad & Civ GRA Rep	MG Gray BG Sagsveen MAJ Winn MAJ Hernicz LTC Menk/CPT Storey	MAJ Paul Conrad 120th ARCOM Bldg. 9810, Lee Rd. Fort Jackson, SC 29207 (803) 751-6152

THE JUDGE ADVOCATE GENERAL'S SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 95 (Continued)

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
10-12 Mar 95	Dallas/Fort Worth 1st LSO Stouffer-Dallas 2222 Stemmons Freeway Dallas, TX 75207	AC GO RC GO Int'l-Ops Law Crim Law GRA Rep	BG Huffman BG Sagsveen LCDR Winthrop MAJ Burrell LTC Hamilton	COL Richard Tanner 401 Ridgehaven Richardson, TX 75080 (214) 991-2124
11-12 Mar 95	Washington, DC 10th LSO NWC (Arnold Auditorium) Fort Lesley J. McNair Washington, DC 20319	AC GO RC GO Int'l-Ops Law Contract Law GRA Rep	MG Gray BG Cullen MAJ Whitaker MAJ Ellcessor LTC Menk/CPT Storey	CPT Robert J. Moore 10th LSO 5550 Dower House Road Washington, DC 20315 (301) 763-3211/2475
18-19 Mar 95	San Francisco, CA 6th LSO Radisson Hotel 1177 Airport Road Burlingame, ca 94010	AC GO RC GO Ad & Civ Crim Law GRA Rep	MG Nardotti BG Sagsveen, BG Lassart, BG Cullen MAJ Peterson LTC Bond COL Reyna	LTC Joe Piasta 717 College Avenue Second Floor Santa Rosa, CA 95404 (707) 544-5858
1-2 Apr 95	Indianapolis, IN National Guard Indianapolis War Memorial 421 North Meridian St. Indianapolis, IN 46204	AC GO RC GO Ad & Civ Crim Law GRA Rep	BG Magers BG Cullen MAJ Diner MAJ Kohlmann LTC Hamilton	COL George A. Hopkins 2002 South Holt Road Indianapolis, IN 46241 (317) 457-4349
7-9 Apr 95	Orlando, FL 174th LSO Airport Marriott 7499 Augusta National Dr. Orlando, FL 32822	AC GO RC GO Contract Law Int'l-Ops Law GRA Rep	MG Nardotti BG Lassart MAJ DeMoss LTC Winters Dr. Foley	MAJ John J. Copelan, Jr. Broward County Attorney 115 South Andrews Avenue Suite 423 Fort Lauderdale, Fl 33301 (305) 357-7600
29-30 Apr 95	Columbus, OH 83d ARCOM/9th LSO/ OH ARNG Best Western-Columbus North 888 East Dublin-Granville Rd. Columbus, OH 43229	AC GO RC GO Ad & Civ Crim Law GRA Rep	BG Cuthbert BG Lassart MAJ J. Frisk MAJ Wright COL Reyna	CPT Mark Otto 9th LSO 765 Taylor Station Rd. Blacklick, OH 43004 (614) 692-5434 DSN: 850-5434
5-7 May 95	Huntsville, AL 121st ARCOM Corps of Engineer Ctr. Huntsville, AL 35805	AC GO RC GO Contract Law Crim Law GRA Rep	MG Nardotti BG Cullen MAJ Hughes MAJ A. Frisk COL Reyna	LTC Bernard B. Downs, Jr. HHC, 3d Trans Bde 3415 McClellan Blvd. Anniston, AL 36201 (205) 939-0033
12-13 May 95	Gulf Shores, AL AL ARNG	AC GO RC GO Contract Law Int'l-Ops Law GRA Rep	BG Cullen MAJ Hughes MAJ Martins Dr. Foley	COL Larry Craven Office of the Adj General ATTN: AL-JA P.O. Box 3711 Montgomery, AL 36109 (205) 271-7471

THE JUDGE ADVOCATE GENERAL'S
SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 95 (Continued)

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
12-14 May 95	Kansas City, MO 89th ARCOM Westin Crown Center One Pershing Road Kansas City, MO 64108	AC GO RC GO Contract Law Ad & Civ GRA Rep	BG Magers BG Lassart MAJ Causey MAJ Jennings LTC Menk	MAJ Rick Tague 89th ARCOM Attn: AFRC-AKS-SJA 3130 Geo Washington Blvd. Wichita, KS 67210-1598 (316) 681-1759 X228

CLE News

1. Attendance at Resident Courses

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those students who have a confirmed reservation. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. **If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.**

Active duty service members must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: ARPC-ZJA-P, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—**181**
Course Name and Number—(for example—133 **Contract Attorneys Course 5F-F10**)
Class Number—(for example—**133** Contract Attorneys Course 5F-F10)

To verify if you have a confirmed reservation, ask your training office to provide you a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1995

6-17 March: 134th Contract Attorneys Course (5F-F10).

20-24 March: 19th Administrative Law for Military Installations Course (5F-F24).

27-31 March: 1st Procurement Fraud Course (5F-F101).

3-7 April: 129th Senior Officers Legal Orientation Course (5F-F1).

18-21 April: 1995 Reserve Component Judge Advocate Workshop (5F-F56) (*Note: the dates have been changed from 17-20 April*).

17-28 April: 3d Criminal Law Advocacy Course (5F-F34).

24-28 April: 21st Operational Law Seminar (5F-F47).

1-5 May: 6th Law for Legal NCOs Course (512-71D/E/20/30).

1-5 May: 6th Installation Contracting Course (5F-F18).

15-19 May: 41st Fiscal Law Course (5F-F12).

15 May-2 June: 38th Military Judge Course (5F-F33).

22-26 May: 42d Fiscal Law Course (5F-F12).

22-26 May: 47th Federal Labor Relations Course (5F-F22).

5-9 June: 1st Intelligence Law Workshop (5F-F41).

5-9 June: 130th Senior Officers' Legal Orientation Course (5F-F1).

12-16 June: 25th Staff Judge Advocate Course (5F-F52).

19-30 June: JATT Team Training (5F-F57).

19-30 June: JAOAC (Phase II) (5F-F55).

5-7 July: Professional Recruiting Training Seminar.

5-7 July: 26th Methods of Instruction Course (5F-F70).

10-14 July: 6th Legal Administrators Course (7A-550A1).

10 July-15 September: 137th Basic Course (5-27-C20).

17-21 July: 2d JA Warrant Officer Basic Course (7A-550A0).

24-28 July: Fiscal Law Off-Site (Maxwell AFB).

31 July-16 May 1996: 44th Graduate Course (5-27-C22).

31 July-11 August: 135th Contract Attorneys Course (5F-F10).

14-18 August: 13th Federal Litigation Course (5F-F29).

14-18 August: 6th Senior Legal NCO Management Course (512-71D/E/40/50).

21-25 August: 60th Law of War Workshop (5F-F42).

21-25 August: 131st Senior Officers Legal Orientation Course (5F-F1).

28 August-1 September: 22d Operational Law Seminar (5F-F47).

6-8 September: USAREUR Legal Assistance CLE (5F-F23E).

11-15 September: USAREUR Administrative Law CLE (5F-F24E).

11-15 September: 2d Federal Courts and Boards Litigation Course (5F-F14).

18-29 September: 4th Criminal Law Advocacy Course (5F-F34).

3. Civilian Sponsored CLE Courses

May 1995:

3-5, GWU: Patents, Technical Data, and Computer Software, Washington, D.C.

7-10, LRP: 16th National Institute on Legal Issues of Education, New Orleans, LA.

9-12, ESI: International Contracting, Washington, D.C.

15-19, GWU: Cost-Reimbursement Contracting, San Diego, CA.

16-19, ESI: Negotiation Strategies and Techniques, Washington, D.C.

16-19, ESI: Managing Cost-Reimbursement Contracts, San Diego, CA.

19, NMTLA: Side-By-Side Programs: Jury Selection & Workers' Compensation, Albuquerque, NM.

24-26, ESI: International Business and Project Management, Washington, D.C.

30, ESI: Federal Information Processing (FIP) Acquisition Update, Washington, D.C.

30-2 June, ESI: Specifications for ADP/T (FIP) Hardware and Software, Washington, D.C

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the September 1994 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
Louisiana**	31 January annually

Jurisdiction	Reporting Month
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	30 days after program
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Annually as assigned
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 June biennially
Wisconsin*	31 December biennially
Wyoming	30 January annually

For addresses and detailed information, see the July 1994 issue of *The Army Lawyer*.

*Military exempt
**Military must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone: commercial (703) 274-7633, DSN 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD A265755	Government Contract Law Deskbook vol. 1/JA-501-1-93 (499 pgs).
AD A265756	Government Contract Law Deskbook, vol. 2/JA-501-2-93 (481 pgs).
AD A265777	Fiscal Law Course Deskbook/JA-506(93) (471 pgs).

Legal Assistance

AD B092128	USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).

AD A263082 Real Property Guide—Legal Assistance/JA-261(93) (293 pgs).

AD A281240 Office Directory/JA-267(94) (95 pgs).

AD B164534 Notarial Guide/JA-268(92) (136 pgs).

AD A282033 Preventive Law/JA-276(94) (221 pgs).

AD A266077 Soldiers' and Sailors' Civil Relief Act Guide/JA-260(93) (206 pgs).

AD A266177 Wills Guide/JA-262(93) (464 pgs).

AD A268007 Family Law Guide/JA 263(93) (589 pgs).

AD A280725 Office Administration Guide/JA 271(94) (248 pgs).

AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).

AD A269073 Model Income Tax Assistance Guide/JA 275-(93) (66 pgs).

AD A283734 Consumer Law Guide/JA 265(94) (613 pgs).

AD A274370 Tax Information Series/JA 269(94) (129 pgs).

AD A276984 Deployment Guide/JA-272(94) (452 pgs).

AD A275507 Air Force All States Income Tax Guide—January 1994.

Administrative and Civil Law

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD A285724 Federal Tort Claims Act/JA 241(93) (167 pgs).

AD A277440 Environmental Law Deskbook, JA-234-1(93) (492 pgs).

AD A283079 Defensive Federal Litigation/JA-200(94) (841 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).

AD A283503 Government Information Practices/JA-235(93) (322 pgs).

AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

AD A286233 The Law of Federal Employment/JA-210(94) (358 pgs).

AD A273434 The Law of Federal Labor-Management Relations/JA-211(93) (430 pgs).

Developments, Doctrine, and Literature

AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs).

Criminal Law

AD A274406 Crimes and Defenses Deskbook/JA 337(93) (191 pgs).

AD A274541 Unauthorized Absences/JA 301(93) (44 pgs).

AD A274473 Nonjudicial Punishment/JA-330(93) (40 pgs).

AD A274628 Senior Officers Legal Orientation/JA 320(94) (297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook/JA 310(93) (390 pgs).

AD A274413 United States Attorney Prosecutions/JA-338(93) (194 pgs).

International and Operational Law

AD A284967 Operational Law Handbook/JA 422(94) (273 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

Obtaining Manuals for Courts-Martial, *DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center (USAPDC) at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications
Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

> The units below are authorized publications accounts with the USAPDC.
>
> (*1*) *Active Army.*
>
> (*a*) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam 25-33.)
>
> (*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> (*c*) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (*b*) above.
>
> (2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> (*3*) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> (*4*) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.
>
> Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

If your unit does not have a copy of *DA Pam 25-33*, you may request one by calling the Baltimore USAPDC at (410) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using *DA Form 4569*. All *DA Form 4569* requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. You may reach this office at (703) 487-4684.

(6) Navy, Air Force, and Marine Corps judge advocates can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

3. LAAWS Bulletin Board Service

a. The Legal Automation Army-Wide System (LAAWS) operates an electronic bulletin board (BBS) primarily dedicated to serving the Army legal community in providing Army access to the LAAWS BBS, while also providing DOD-wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Army access to the LAAWS BBS is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772):

(a) Active duty Army judge advocates;

(b) Civilian attorneys employed by the Department of the Army;

(c) Army Reserve and Army National Guard (NG) judge advocates on active duty, or employed by the federal government;

(d) Army Reserve and Army NG judge advocates *not* on active duty (access to OPEN and RESERVE CONF only);

(e) Active, Reserve, or NG Army legal administrators; Active, Reserve, or NG enlisted personnel (MOS 71D/71E);

(f) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(g) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g. DLA, CHAMPUS, DISA, Headquarters Services Washington);

(h) Individuals with approved, written exceptions to the access policy.

Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
Attn: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

(2) DOD-wide access to the LAAWS BBS currently is restricted to the following individuals (who can sign on by dialing commercial (703) 806-5791, or DSN 656-5791):

All DOD personnel dealing with military legal issues.

c. The telecommunications configuration is: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. After signing on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and tell them they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four to forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

d. *Instructions for Downloading Files from the LAAWS BBS.*

(1) Log onto the LAAWS BBS using ENABLE, PROCOMM, or other telecommunications software, and the communications parameters listed in subparagraph c, above.

(2) If you have never downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. For Army access users, to download it onto your hard drive, take the following actions (DOD-wide access users will have to obtain a copy from their sources) after logging on:

(a) When asked to select a "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12] and hit the enter key when asked to view other conference members.

(c) Once you have joined the Automation Conference, enter [d] to Download a file off the Automation Conference menu.

(d) When prompted to select a file name, enter [pkz110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].

(g) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed" and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging onto the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c, below. A listing of available files can be viewed by selecting File Directories from the main menu.

(c) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you the ENABLE top-line menu. If you are using ENABLE 3.XX select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.

(e) When asked to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. Once the operation is complete, the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log-off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it in ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

e. *TJAGSA Publications Available Through the LAAWS BBS.* The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

FILE NAME	UPLOADED	DESCRIPTION
RESOURCE.ZIP	June 1994	A Listing of Legal Assistance Resources, June 1994.
ALLSTATE.ZIP	January 1994	1994 AF AllStates Income Tax Guide for use with 1993 state income tax returns, January 1994.
ALAW.ZIP	June 1990	*Army Lawyer/Military Law Review* Database ENABLE 2.15. Updated through the 1989 *Army Lawyer* Index. It includes a menu system and an explanatory memoran dum, ARLAWMEM.WPF.
BBS-POL.ZIP	December 1992	Draft of LAAWS BBS operating procedures for TJAGSA policy counsel representative.

FILE NAME	UPLOADED	DESCRIPTION
BULLETIN.ZIP	January 1994	List of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school and video productions, November 1993.
CLG.EXE	December 1992	Consumer Law Guide Excerpts. Documents were created in Word Perfect 5.0 or Harvard Graphics 3.0 and zipped into executable file.
DEPLOY.EXE	December 1992	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FOIAPT1.ZIP	May 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FOIAPT.2.ZIP	June 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FSO 201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
JA200A.ZIP	August 1994	Defensive Federal Litigation—Part A, August 1994.
JA200B.ZIP	August 1994	Defensive Federal Litigation—Part B, August 1994.
JA210.ZIP	November 1993	Law of Federal Employment, September 1993.
JA211.ZIP	January 1994	Law of Federal Labor-Management Relations, November 1993.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.
JA234-1.ZIP	February 1994	Environmental Law Deskbook, Volume 1, February 1994.
JA235.ZIP	August 1994	Government Information Practices Federal Tort Claims Act.
JA241.ZIP	September 1994	Federal Tort Claims Act, August 1994.
JA260.ZIP	March 1994	Soldiers' & Sailors' Civil Relief Act, March 1994.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, June 1993.
JA262.ZIP	April 1994	Legal Assistance Wills Guide.
JA263.ZIP	August 1993	Family Law Guide, August 1993.
JA265A.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part A, May 1994.
JA265B.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part B, May 1994.
JA267.ZIP	July 1994	Legal Assistance Office Directory, July 1994.
JA268.ZIP	March 1994	Legal Assistance Notarial Guide, March 1994.
JA269.ZIP	January 1994	Federal Tax Information Series, December 1993.
JA271.ZIP	May 1994	Legal Assistance Office Administration Guide, May 1994.
JA272.ZIP	February 1994	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References.
JA275.ZIP	August 1993	Model Tax Assistance Program.
JA276.ZIP	July 1994	Preventive Law Series, July 1994.

FILE NAME	UPLOADED	DESCRIPTION
JA281.ZIP	November 1992	15-6 Investigations.
JA285.ZIP	January 1994	Senior Officer's Legal Orientation Deskbook, January 1994.
JA290.ZIP	March 1992	SJA Office Manager's Handbook.
JA301.ZIP	January 1994	Unauthorized Absences Programmed Text, August 1993.
JA310.ZIP	October 1993	Trial Counsel and Defense Counsel Handbook, May 1993.
JA320.ZIP	January 1994	Senior Officer's Legal Orientation Text, January 1994.
JA330.ZIP	January 1994	Nonjudicial Punishment Programmed Text, June 1993.
JA337.ZIP	October 1993	Crimes and Defenses Deskbook, July 1993.
JA4221.ZIP	April 1993	Op Law Handbook, Disk 1 of 5, April 1993.
JA4222.ZIP	April 1993	Op Law Handbook, Disk 2 of 5, April 1993.
JA4223.ZIP	April 1993	Op Law Handbook, Disk 3 of 5, April 1993.
JA4224.ZIP	April 1993	Op Law Handbook, Disk 4 of 5, April 1993.
JA4225.ZIP	April 1993	Op Law Handbook, Disk 5 of 5, April 1993.
JA501-1.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 1, May 1993.
JA501-2.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 2, May 1993.
JA505-11.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 1, July 1994.
JA505-12.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 2, July 1994.
JA505-13.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 3, July 1994.
JA505-14.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 4, July 1994.
JA505-21.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 1, July 1994.
JA505-22.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 2, July 1994.
JA505-23.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 3, July 1994.
JA505-24.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 4, July 1994.
JA506-1.ZIP	November 1994	Fiscal Law Course Deskbook, Part 1, October 1994.
JA506-2.ZIP	November 1994	Fiscal Law Course Deskbook, Part 2, October 1994.
JA506-3.ZIP	November 1994	Fiscal Law Course Deskbook, Part 3, October 1994.
JA508-1.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA508-2.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
1JA509-1.ZIP	November 1994	Federal Court and Board Litigation Course, Part 1, 1994.

FILE NAME	UPLOADED	DESCRIPTION
1JA509-2.ZIP	November 1994	Federal Court and Board Litigation Course, Part 2, 1994.
1JA509-3.ZIP	November 1994	Federal Court and Board Litigation Course, Part 3, 1994.
1JA509-4.ZIP	November 1994	Federal Court and Board Litigation Course, Part 4, 1994.
JA509-1.ZIP	February 1994	Contract, Claims, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	February 1994	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JAGSCHL.WPF	March 1992	JAG School report to DSAT.
YIR93-1.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-3.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1994	Contract Law Division 1993 Year in Review text, 1994 Symposium.

f. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law, Criminal Law, Contract Law, International and Operational Law, or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5¼-inch or 3½-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

g. Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SGT Kevin Proctor, Commercial (703) 806-5764, DSN 656-5764, or at the address in paragraph b(1)(h), above.

4. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. Articles

The following information may be of use to judge advocates in performing their duties:

Major Michael H. Gilbert, *Combatting Sexual Harassment in the Air Force*, 24 REPORTER 1 (1994).

6. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JAGS-DDS, The Judge Advocate General's School, United States Army, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

*U.S. Government Printing Office: 1995— 386-699/00011

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:

MILTON H. HAMILTON
Administrative Assistant to the
Secretary of the Army
07922

Distribution: Special

Department of the Army
The Judge Advocate General's School
US Army
ATTN: JAGS-DDL
Charlottesville, VA 22903-1781

SECOND CLASS MAIL

PIN: 073503-000